Supreme Court, U.S.
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No. 01- OFFICE OF THE

In the
Supreme Court of the United States

BANK ONE, N.A.,
PETITIONER,

v.

MYRA MAE SHUMAKE, ET AL.,
RESPONDENTS.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the prudential, judge-made "tribal exhaustion" doctrine should be expanded to displace the statutory command of the Federal Arbitration Act (FAA), 9 U.S.C. § 4, which creates a judicial remedy in federal district court for the enforcement of agreements to arbitrate.

2. Whether Indian tribal court jurisdiction extends to civil suits arising out of alleged commercial relationships between members and non-members of the tribe, where such assertions of jurisdiction are not necessary to protect tribal self-government or to control internal tribal relations – a question left open by this Court in *Nevada v. Hicks*, 533 U.S. 353 (2001).

LIST OF PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states that the parties to the proceeding in the court of appeals were:

Bank One, N.A.
Myra Mae Shumake
Darlene Vaughn
Andria Williamson
Karren Sam
Virginia Willis
Willie Willis
Lavern Willis
Brainard Lewis
Robin Willis
Danita Willis
Dina Thomas
Rose Willis

RULE 29.6 STATEMENT

Bank One, N.A. is a national banking association organized under the laws of the United States with its principal place of business in Ohio. It is a wholly owned subsidiary of Bank One Corporation, which is a public held corporation that has issued securities to the public.

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PETITION FOR WRIT OF CERTIORARI

Bank One, N.A. ("Bank One") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 281 F.3d 507. The opinion of the district court (Pet. App. 15a-35a) is reported at 144 F. Supp.2d 640.

JURISDICTION

The court of appeals issued its decision on Feb. 15, 2002. Bank One's timely petitions for rehearing and rehearing *en banc* were denied on Mar. 28, 2002. Pet. App. 36a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Federal Arbitration Act are reprinted in the Appendix, Pet. App. 38a-42a.

STATEMENT

In this case, the Fifth Circuit held that a prudential, judge-made rule – the so-called "tribal exhaustion" doctrine – should be expanded to displace the statutory command of the Federal Arbitration Act (FAA), 9 U.S.C. § 4. Section 4 of the FAA directs federal district courts to entertain motions to compel arbitration notwithstanding the pendency of actions in another forum in which the issue of arbitration might be raised. The Fifth Circuit nevertheless held that, when there is an action pending in Indian tribal court, a federal district court *may not* adjudicate a motion to compel arbitration under the FAA, even though a party has breached a legally enforceable arbitration agreement.

This case presents this Court with the opportunity to resolve two important legal questions on which the lower courts have diverged.

First, this case presents the question whether the statutory directives of the FAA may be supplanted by a judge-made, prudential practice in the form of the "tribal exhaustion" doctrine. The Fifth Circuit's decision ignores the text and purpose of the FAA and defeats "the 'liberal federal policy favoring arbitration agreements.'" *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000) (citation omitted). The Fifth Circuit's ruling also conflicts with the many decisions of this Court and other appellate courts giving effect to the important federal pro-arbitration policy.

This case is an ideal vehicle to decide the question presented because the enforceability of the arbitration provision at issue has been resolved. In a related series of cases, the Fifth Circuit itself has recently confirmed that the very same arbitration clause at issue in this case is valid and binding as a matter of law. *See Bank One, N.A. v. Lake*, 2002 U.S. App. Lexis 7793 (5th Cir. Apr. 5, 2002) (unpublished); *Bank One, N.A. v. Coates*, 125 F. Supp.2d 819 (S.D. Miss. 2001), *aff'd without op.*, 2002 U.S. App. Lexis 7759 (5th Cir. Apr. 5, 2002). In another series of cases, the Fifth Circuit has reaffirmed, following *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), that the FAA does not permit a federal district court to defer to pending litigation in state court in which the issue of arbitration might be raised. *Bank One, N.A. v. Boyd*, 2002 U.S. App. Lexis 6226 (5th Cir. Apr. 5, 2002).

In stark contrast, the Fifth Circuit in *this* case has held that a federal court must defer to a tribal court under precisely the same circumstances – even though states are fully "sovereign entities" protected by the Constitution and basic axioms of federalism, *Alden v. Maine*, 527 U.S. 706, 713 (1999), while Indian tribes are, to quote this Court again, merely "federal 'wards.'" *Rice v. Rehner*, 463 U.S. 713, 731 n.15 (1983) (citation omitted). This case therefore presents the question whether the "tribal exhaustion" doctrine should be expanded simultaneously to thwart the important federal statutory policy of arbitration and to

turn the relative status of state and tribal courts upside down.

This case also presents a second important question relating to tribal court jurisdiction. The Fifth Circuit held that Indian tribal courts may exercise civil jurisdiction over defendants who are non-members of the tribe so long as the dispute arises out of "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" (Pet. App. 7a n.13) (internal quotation omitted) – without regard to whether such assertions of jurisdiction are necessary to protect tribal self-government or to control internal tribal relations. The Fifth Circuit's judgment extends tribal court jurisdiction far beyond anything ever approved by this Court and conflicts with decisions rendered by other appellate courts.

The Fifth Circuit failed even to cite, much less analyze, this Court's most recent decision interpreting the "tribal exhaustion" doctrine and the limits of tribal civil jurisdiction. *Nevada v. Hicks*, 533 U.S. 353 (2001). Instead, the Fifth Circuit erroneously described *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), as "the most recent Supreme Court case" relevant to the dispute. Pet. App. 7a.

This Court should grant plenary review to resolve the important questions raised by the Fifth Circuit's decision. Alternatively, because the Fifth Circuit's decision cannot be squared with *Nevada v. Hicks*, this Court should summarily reverse the Fifth Circuit's judgment or GVR the decision below in light of *Nevada v. Hicks*, 533 U.S. 353 (2001).

1. Background. These consolidated cases arise out of Bank One revolving charge accounts used to finance the purchase of television satellite systems. Individuals seeking to establish a revolving charge account with Bank One ("Cardmembers") were required to complete and execute a Credit Application and

Security Agreement (the "Credit Application"). R. 63, 67.[1] The Credit Application was accompanied by a Revolving Credit Card Plan and Disclosure Statement (the "Cardmember Agreement"), which addressed, among other things, how the agreement could be amended. The amendment provision stated that Bank One "may change or amend the terms of this Agreement upon fifteen (15) days prior written notice if required by law." R. 19. The Cardmember Agreement also provided that a Cardmember's account would be governed by Ohio and applicable federal law. R. 20.

On March 8, 1998, Bank One notified its Cardmembers of a proposed modification to the Cardmember Agreement (the "Notice"). R. 64. The Notice clearly stated that the Cardmember Agreement would be modified by adding a clause ("the Arbitration Provision") providing that any disputes between Bank One and Cardmembers "shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure in effect at the time the Claim is filed" and "shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16." R. 21. The Notice continued, in block capital letters:

> IN THE ABSENCE OF THIS ARBITRATION AGREEMENT YOU AND WE MAY OTHERWISE HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE CLAIMS THROUGH A COURT, AND/OR TO PARTICIPATE OR BE REPRESENTED IN LITIGATION FILED IN COURT BY OTHERS, BUT EXCEPT AS OTHERWISE PROVIDED ABOVE, ALL CLAIMS MUST NOW BE RESOLVED THROUGH ARBITRATION.

R. 21.

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[1] Citations to the Record in the Court of Appeals, No. 01-60234 (5th Cir.), are styled "R. ___."

Cardmembers were given the option of rejecting the Arbitration Provision contained in the Notice. R. 66. Cardmembers who rejected the changes contained in the Notice could maintain their accounts under the prior terms of the Cardmember Agreement. R. 21, 66. If Cardmembers did not reject the changes in writing, all claims asserted after April 15, 1998 by either a Cardmember or Bank One were subject to binding arbitration. Although some Bank One customers rejected the Arbitration Provision, none of the Respondents notified Bank One of their refusal to accept the terms of the Arbitration Provision. R. 66.

2. Procedural History. Between February and August 2000, Respondents – each of whom had accepted the amendment to the Cardmember Agreement – filed complaints against Bank One in the Choctaw Tribal Court of the Mississippi Band of Choctaw Indians ("Tribal Court Actions"). R. 11. In the Tribal Court Actions, Respondents alleged that each financed the purchase of a television satellite system through an account with Bank One. They filed these actions despite their agreement to arbitrate any disputes with Bank One. In response, Bank One exercised its rights under the FAA by filing in the Southern District of Mississippi a separate complaint against each Respondent to compel arbitration.

On February 20, 2001, the District Court issued Memorandum Opinions and Orders and Judgments in these consolidated cases dismissing Bank One's complaints on the basis of the tribal exhaustion doctrine. Pet. App. 15a. The District Court explained that "[t]he tribal exhaustion rule is not jurisdictional, but rather is a 'prudential' rule pursuant to which a federal court, in view of comity considerations, 'should stay its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction.'" *Id.* at 17a (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997)). The court acknowledged that "[t]he tribal exhaustion doctrine is not * * * applicable to every case to which a tribe or a member is a party,

and thus it must be determined whether the circumstances of this case are such as to invoke the requirements of tribal exhaustion." *Id.* at 20a.

The District Court opined that the defendants had "advanced the requisite colorable claim of tribal jurisdiction, since the activities of which [they] complain[] not only occurred on the [Choctaw] reservation, but also involve the formation of an ostensible consensual relationship between Bank One and a member of the tribe." *Id.* at 21a. The court rejected Bank One's argument that FAA § 4 unmistakably authorized Bank One to invoke federal-court jurisdiction to enforce the arbitration agreement between the parties. Although the court conceded that § 4 of the FAA grants any party aggrieved by the breach of an arbitration agreement the right to petition a United States district court for an order compelling arbitration, the district court observed that the FAA does not include an independent grant of federal question jurisdiction, something the court considered essential to negate the judge-made tribal exhaustion doctrine. *Id.* at 26a-28a. Accordingly, the District Court dismissed Bank One's complaints in their entirety.

3. The Court of Appeals' Decision. The Fifth Circuit affirmed. Pet. App. 1a. The court of appeals began by holding that the Choctaw tribal court had jurisdiction over Respondents' suits, even though Bank One is a non-member of the Choctaw tribe: "As a threshold inquiry under the tribal exhaustion doctrine, we must determine whether the tribal court's jurisdiction is explicitly limited." Pet. App. 6a n.13. "Although tribes usually do not have jurisdiction over non-Indians for activities off the reservation or Indian-fee land, *Montana* [*v. United States*, 450 U.S. 544 (1981),] noted several exceptions." *Id.* "One of its exceptions . . . applies here: 'A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Id.* (quoting *Montana*,

450 U.S. at 565).

After addressing the jurisdictional issue, the Fifth Circuit held that the judge-made tribal exhaustion doctrine displaces the statutory right to federal court protection under the FAA. The Fifth Circuit did not analyze the text, structure, or purpose of the FAA. Nor did the court address *Nevada v. Hicks*, 533 U.S. 353 (2001), the most recent Supreme Court decision interpreting the tribal exhaustion doctrine, even though the parties had addressed *Nevada v. Hicks* at oral argument and in letters to the court of appeals under FRAP 28(j). Rather, the Fifth Circuit mistakenly described *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), as "the most recent Supreme Court case" on the issue. Pet. App. 7a.

The court of appeals observed that, "[a]lthough the FAA reflects a strong policy favoring the enforcement of arbitration clauses," it "does not provide an independent ground of federal jurisdiction. To sue in federal court to enforce an arbitration claim, a petitioner must demonstrate the existence of federal subject matter jurisdiction on the *underlying* contract claim." Pet. App. 9a (emphasis in original). The court of appeals held that, under *Neztsosie*, the absence of an independent ground of federal subject matter jurisdiction in the FAA meant that the judge-made tribal exhaustion doctrine supplanted Bank One's statutory rights under the FAA. The court of appeals reached that result even though the creation of federal subject matter jurisdiction was not the test set forth in *Neztsosie*.

Bank One filed timely petitions for rehearing and rehearing *en banc*, which were denied on March 28, 2002. Pet. App. 36a.

4. The Enforceability of the Arbitration Provision is Confirmed by State-Court and Federal Litigation. Although the court of appeals has now remitted Bank One to the vagaries of the Choctaw tribal court system, the Fifth Circuit reached the opposite result with respect to pending *state-court* litigation against Bank One involving the very same satellite dish claims.

In *Bank One, N.A. v. Boyd*, 2002 U.S. App. Lexis 6226 (5th Cir. Apr. 5, 2002), the court of appeals held that a district court abused its discretion in deferring to a pending state-court proceeding in which the issue of arbitration could have been raised. The Fifth Circuit ruled that the federal district court was required to rule on Bank One's motion to compel arbitration under the FAA.

In another related series of proceedings, the Fifth Circuit has affirmed nineteen decisions of three different district courts compelling arbitration under the same Bank One Arbitration Provision. *Bank One, N.A. v. Lake*, 2002 U.S. App. Lexis 7793 (5th Cir. Apr. 5, 2002) (unpublished). Every federal district and bankruptcy court to have considered the validity of the Bank One Arbitration Provision has concluded that it is enforceable as a matter of law and has compelled arbitration. The district and bankruptcy courts have also unanimously denied motions for discovery, jury trial, or evidentiary hearing. For example, Chief Judge Tom S. Lee found that the Arbitration Provision "began with the heading 'IMPORTANT NOTICE.' *The language of the notice was clear* as to the defendant's choice to accept or reject the arbitration clause; *and the arbitration clause itself was not filled with 'legalese' as defendant claims, but was instead clear.*" *Bank One, N.A. v. Coates* 125 F. Supp.2d 819, 833 (S.D. Miss. 2001) (emphasis added), *aff'd without op.*, 2002 U.S. App. Lexis 7759 (5th Cir. Apr. 5, 2002).

In addition, a federal bankruptcy judge has upheld the Bank One Arbitration Provision and compelled arbitration in a proceeding involving Bank One and another member of the Choctaw Tribe. *Bank One, N.A. v. Chickaway (In re Chickaway)*, No. 97-10630 EEG (Bankr. S.D. Miss. Feb. 26, 2002). Chickaway's circumstances are identical in every relevant respect to those of the Respondents in this case. She made the same allegations in a complaint originally filed in tribal court. The disparity in treatment between Ms. Chickaway and the remaining members of the Tribe is occasioned solely by the

accident of federal bankruptcy jurisdiction. But the simultaneous pendency of *In re Chickaway* confirms the enforceability of the Bank One Arbitration Provision and the mischief caused by the tribal exhaustion doctrine in this case.

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law regarding the Federal Arbitration Act, the tribal exhaustion doctrine, and the circumstances in which Indian tribal courts may exercise jurisdiction over nonmembers. The Fifth Circuit's judgment conflicts with this Court's decisions in *Nevada v. Hicks*, 533 U.S. 353 (2001), *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), as well as with decisions of other appellate courts. This Court's review is plainly warranted.

A. This Court Should Grant Review To Establish That the Prudential Tribal Exhaustion Doctrine Does Not Displace the Statutory Commands of the FAA.

1. *The Tribal Exhaustion Doctrine is Merely Prudential.*

The tribal exhaustion doctrine was announced in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), a case involving a tort suit initiated by a tribal member against a school district and its insurer. The tribal member brought suit in tribal court, and the defendants promptly sued for a declaration that the tribal court had no jurisdiction to entertain a civil suit against a non-Indian. This Court held that, in such circumstances, the examination of the tribal court's jurisdiction "should be conducted in the first instance in the Tribal Court itself." *Id.* at 856. The Court explained that the jurisdictional inquiry may often be a fact-intensive exercise and that "the orderly administration of justice" would be served "by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is

addressed." *Id.* "Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857. The Court recognized that exhaustion is not required "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith"; "where the action in tribal court is patently violative of express jurisdictional prohibitions"; or "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction." *Id.* at 857 n.21 (internal quotation and citation omitted).

The doctrine was extended to the diversity context in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), which explained that "tribal courts are best qualified to interpret and apply tribal law." *Id.* at 16. The Court affirmed the limits of the doctrine, opining that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite," *id.* at 16 n.8, and that "Congress undoubtedly has the power to limit tribal court jurisdiction." *Id.* at 17. *See also Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 450 (1997) ("[W]e do not extract from *National Farmers* anything more than a prudential exhaustion rule, in deference to the capacity of tribal courts 'to explain to the parties the precise basis for accept [or rejecting] jurisdiction.'") (citation omitted; brackets in original).

The tribal exhaustion doctrine has been the source of much confusion in the lower courts. The district court in this case opined that the doctrine is "not clear" and noted the differences among lower court decisions. Pet. App. 25a n.7. "[T]he courts have been unable to reach a consensus with respect to the scope of this 'utterly novel rule' in large part because 'the Supreme Court did not clearly delineate the class of cases to which the

tribal exhaustion doctrine applies.'"[2] Even after *Nevada v. Hicks*, commentators continue to complain that "the entire area is awash in confusion." Cynthia Ford, *Including Indian Law in a Traditional Civil Procedure Course: A Reprise, Five Years Later*, 37 TULSA L.J. 485, 502 (2001).

This case presents an ideal vehicle to clarify the scope of the tribal exhaustion doctrine and to establish that it does not displace the statutory commands of Congress embodied in the FAA. The FAA reflects an important federal pro-arbitration policy and a distinct congressional preference for a federal judicial forum. *See, e.g., Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000). "[W]here important federal interests are at stake . . . comity yields." *United States v. Gillock*, 445 U.S. 360, 373 (1980). Indeed, this Court has held that the principles of the FAA are not displaced by many other federal statutes. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (FAA not displaced by ADEA); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-84 (1989) (Securities Act); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (Securities Exchange Act and RICO statute); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-40 (1985) (Sherman Act).

None of these important federal statutory policies displaces the FAA. Accordingly, the Fifth Circuit erred in holding that the FAA could be supplanted by a merely prudential, judge-made doctrine of tribal exhaustion. Indeed, this Court has already held that an Indian tribe may waive its sovereign immunity from suit by agreeing to a standard form arbitration contract. *See C & L Enterprises v. Citizen Band Potawatomi Indian Tribe of*

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[2] Blake A. Watson, *The Curious Case Of Disappearing Federal Jurisdiction Over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531, 535 (1997) (citations omitted).

Oklahoma, 532 U.S. 411 (2001). If the federal policy of arbitration is so strong as to effect a waiver of an entire tribe's immunity, it would be astonishing to hold that an individual tribal member may defeat the pro-arbitration policy by commencing suit in tribal court despite the existence of a legally binding arbitration agreement.

2. *The Text, Structure, and Purpose of the FAA Demonstrate That It Is Not Displaced By the Tribal Exhaustion Doctrine.*

Under *Nevada v. Hicks*, 533 U.S. 353 (2001), this Court's most recent discussion of the tribal exhaustion doctrine, that rule does not apply to suits to compel arbitration under § 4 of the FAA. Remarkably, the Fifth Circuit did not cite – let alone apply – *Hicks* even though it was the subject of FRAP 28(j) letters by both parties and was addressed at oral argument. Accordingly, this Court should summarily reverse the Fifth Circuit's judgment, or GVR the case in light of *Hicks*, if this Court does not grant plenary review.

In *Hicks*, this Court held that the tribal exhaustion doctrine does not apply to actions brought under 42 U.S.C. § 1983. 533 U.S. at 369. This Court opined that tribal courts, unlike state courts, are not "courts of 'general jurisdiction'" and that the tribal exhaustion doctrine does not apply to § 1983 claims because "no provision in federal law" explicitly establishes tribal jurisdiction over such claims. *Id.* at 367, 368.

Similarly, no provision of federal law explicitly grants tribal courts jurisdiction over § 4 arbitration claims. In fact, the text, structure, and purpose of the FAA all indicate that the tribal exhaustion doctrine is inapplicable. The plain language of § 4 of the FAA grants parties the right to file an arbitration petition in "any United States district court." The statute thereby singles out the *federal courts* by name and imposes on them a special duty to entertain petitions for arbitration. The Fifth Circuit improperly negated this statutory right to a federal forum by

misapplying the prudential, judge-made tribal exhaustion doctrine – even though the FAA was specifically intended to override judge-made rules that hinder arbitration. *See Green Tree Financial Corp.*, 531 U.S. at 89.

Section 4 of the FAA is a special statutory procedure designed to provide a federal forum for the "specific enforcement" of arbitration agreements. *American Sugar Refining Co. v. The Anaconda*, 138 F.2d 765, 766-67 (5th Cir. 1943), *aff'd*, 322 U.S. 42 (1944). This Court has opined that "the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985). The FAA "calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses." *Moses H. Cone*, 460 U.S. at 29. *See also Green Tree Financial Corp.*, 531 U.S. at 85 (FAA's "goal [is to] 'mov[e] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible'") (citation omitted).

This special right to a federal forum for expeditious enforcement of arbitration clauses would be nullified if the tribal exhaustion doctrine were applied.

Moreover, the FAA also contains a special right to immediate appeal, which would also be defeated if tribal exhaustion were required. Section 16 of the FAA, 9 U.S.C. § 16, provides for immediate appeal of federal court orders hostile to arbitration, "whether the orders are final or interlocutory." *Green Tree*, 531 U.S. at 86. This special interest in affording immediate federal appellate review of orders denying arbitration could not be accommodated if the tribal exhaustion doctrine were applicable.

Applying the tribal exhaustion doctrine in the arbitration context would create what this Court in *Hicks* termed "serious anomalies" in the federal statutory scheme. 533 U.S. at 368. *See also id.* at 383-84 (Souter, J., joined by Kennedy and Thomas, JJ., concurring). Just as those anomalies showed in *Hicks* that

the tribal exhaustion doctrine did not apply to § 1983 cases, here they demonstrate that the doctrine does not apply to suits under § 4 of the FAA.

Another tell-tale sign that the tribal exhaustion doctrine is inapplicable is what the FAA does *not* say. Like § 1983 at issue in *Hicks*, § 4 of the FAA does not mention tribal courts. This Court has held that the uncertainty over whether a *state* court is bound by § 4 is enough to eliminate any discretion of federal courts to abstain in favor of state courts. *See Moses H. Cone*, 460 U.S. at 26-27. *A fortiori*, the uncertainty about whether tribal courts are bound by § 4 of the FAA is enough to render the tribal exhaustion doctrine inapplicable in the context of petitions to compel arbitration. If a federal court faced with a motion to compel arbitration under § 4 of the FAA may not defer to pending litigation in *state* court – even if the arbitration issue could be raised in the state forum – then the federal court certainly should not defer to a *tribal* court. As this Court observed in *Hicks*, tribal courts lack the co-equal status of state courts: "This historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts." 533 U.S. at 367.

The Fifth Circuit's decision would have the anomalous effect of wrongly elevating tribal courts over state courts – even though Indian tribes (unlike States) are wards of Congress and "have lost many of the attributes of sovereignty." *Montana v. United States*, 450 U.S. 544, 563 (1981). Tribal immunity "developed almost by accident." *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 756 (1998). By contrast, of course, the States are independent sovereigns which have been held to enjoy immunity from suit and protection against federal interference under the Tenth and Eleventh Amendments and the

structural architecture of the Constitution.[3] Tribal courts should not be elevated over state courts.[4]

3. *This Court's Decision In* Neztsosie *Provides a Further Reason to Grant Review.*

The Fifth Circuit purported to apply *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), where this Court held that the tribal exhaustion doctrine does not apply to claims under the federal Price-Anderson Act. *Id.* at 484-85. Far from supporting the Fifth Circuit's decision, *Neztsosie* demonstrates the need for this Court's review. For, properly applied, *Neztsosie* shows that the FAA reflects an unmistakable congressional preference for a federal judicial forum and therefore is not displaced by the tribal exhaustion doctrine.

The Fifth Circuit opined that, unlike the Price-Anderson Act

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[3] *See generally Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (ADA did not validly abrogate state sovereign immunity); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (ADEA did not validly abrogate state sovereign immunity); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (Art. I does not authorize Congress to abrogate state sovereign immunity); *Alden v. Maine*, 527 U.S. 706 (1999) (Congress may not subject state to suit in state court without its consent); *Printz v. United States*, 521 U.S. 898, 917 (1997) (striking down Brady law); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 703, n. 10 (1982) (States are "'coequal sovereigns in a federal system'") (citation omitted); *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn.*, 455 U.S. 691, 704 (1982) (recognizing "the structure of our Nation as a union of States, each possessing equal sovereign powers").

[4] In *Chickasaw Nation v. United States*, 122 S. Ct. 528 (2001), this Court held that the Indian Gaming Regulatory Act does not exempt Indian tribes from paying gambling-related taxes that States need not pay. The Court expressly rejected the tribe's request to apply "a special Indian-related interpretive canon, namely, 'statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.'" *Id.* at 532 (citation omitted).

at issue in *Neztsosie*, "the FAA does not provide an independent ground of federal jurisdiction." Pet. App. 9a. But the court of appeals misstated the test set forth in *Neztsosie*. In two separate passages, *Neztsosie* explained that the standard for displacing the tribal exhaustion doctrine is not whether there is exclusive federal subject-matter jurisdiction but whether there is an unmistakable congressional "preference for a federal forum." 526 U.S. at 484-85, 487 n.7. In yet a third portion of the opinion, the Court reiterated that the tribal exhaustion doctrine was displaced because "leaving such claims in [tribal] courts" would "thwart the Act's policy of getting such cases into a federal forum." *Id.* at 487. This Court's choice of language must have been deliberate, for the Price-Anderson Act authorizes the removal only of state-court suits and is *silent* with respect to actions arising in tribal courts. *See* 42 U.S.C. § 2210. Because the Price-Anderson Act does *not* expressly provide for the removal of claims from tribal courts, *Neztsosie* plainly does *not* require creation of exclusive federal-court jurisdiction, or an express congressional bar on tribal court jurisdiction, in order to find displacement of the tribal exhaustion doctrine. Rather, the question is whether displacement of the tribal exhaustion doctrine can be inferred from Congress' handiwork.

Neztsosie relied on an explicit parallel between state and tribal courts. This Court opined that "[w]e are at a loss to think of any reason that Congress would have favored tribal exhaustion. * * * The apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal as to state-court litigation." *Id.* at 485-86. "It is not credible that Congress would have uniquely countenanced, let alone chosen, such a delay when public liability claims are brought in tribal court." *Id.* at 487. "[L]eaving such claims in [tribal] courts would just as effectively thwart the Act's policy of getting such cases into a federal forum for consolidation, as leaving them in state forums would do." *Id.*

Precisely the same analysis governs here and demonstrates

that the FAA displaces the tribal exhaustion doctrine. The reason that Congress created an immediate federal-court forum to enforce arbitration agreements – in order to overcome judicial hostility to arbitration agreements, *see Green Tree Financial Corp.*, 531 U.S. at 89 – is equally applicable to tribal courts. It is unthinkable that Congress would have wanted state-court actions to proceed promptly to arbitration while allowing Indian tribal court disputes to languish in litigation – particularly in light of "[t]he special nature of [Indian] tribunals." *Duro v. Reina*, 495 U.S. 676, 693 (1990).

Tribal courts "differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges." *Hicks*, 533 U.S. at 384 (Souter, J., joined by Kennedy and Thomas, JJ., concurring). "Although some modern tribal courts 'mirror American courts' and 'are guided by written codes, rules, procedures, and guidelines,' tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.'" *Id.* (citation omitted). "The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' which would be unusually difficult for an outsider to sort out." *Id.* at 384-85 (citation omitted). "The result, of course, is a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that '[t]ribal courts are often subordinate to the political branches of tribal governments.'" *Id.* at 385(citation omitted).

It is inconceivable that Congress would have intended to leave federal rights under the FAA to such an uncertain fate in tribal court while affording state-court litigants ready access to a federal forum under § 4 of the FAA. To be sure, the FAA does not create federal subject-matter jurisdiction for cases arising in either state or tribal court. But that absence has not stopped this

Court from recognizing the ability of state-court defendants to file federal-court motions to compel arbitration under § 4. This Court has expressly warned that the lack of a grant of subject-matter jurisdiction in the FAA is not to be misconstrued as weakening Congress' preference for a federal forum in arbitration cases. *See Moses H. Cone*, 460 U.S. at 25 n.32. Moreover, the FAA is in some respects more potent than the Price-Anderson Act, despite the FAA's lack of a grant of subject-matter jurisdiction. Under § 4 of the FAA, Congress has granted a party the right to halt a state-court action by filing a new federal suit to compel arbitration and securing an injunction against the state-court litigation. *Merrill Lynch v. Haydu*, 637 F.2d 391, 395 (5th Cir. 1981). The ability to enjoin state-court actions, despite the limits of 28 U.S.C. § 2283, means that the FAA exhibits a preference for a federal forum that is at least as strong as (if not *stronger* than) the creation of removal authority through a grant of federal question jurisdiction. Accordingly, the Fifth Circuit's judgment conflicts with this Court's decision in *Neztsosie*.

4. *The Fifth Circuit's Decision Conflicts With The Decisions of Other Circuits.*

The Fifth Circuit's decision also conflicts with those of other circuits. First, the decision conflicts with cases recognizing that the tribal exhaustion doctrine does not displace other federal statutes. *See, e.g., Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097-98 (8th Cir. 1989) (holding that tribal exhaustion doctrine is inapplicable to claims under Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*); *Lower Brule Construction v. Sheesley's Plumbing*, 84 B.R. 638 (D.S.D. 1988) (tribal exhaustion doctrine does not apply to adversary proceeding under Bankruptcy Code). The only difference between the FAA and these statutes is the absence of a grant of subject-matter jurisdiction. As noted in Part I-A-3, however, that distinction does not make a material difference. *See Neztsosie*, 526 U.S. at 484-85, 487 n.7.

In addition, the Fifth Circuit's decision conflicts with the decisions of circuits recognizing that the tribal exhaustion doctrine, as a prudential, judge-made rule, is always subject to the caveat that it does not apply where there are no practical reasons to invoke it. *See Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 83 (2d Cir. 2001) (tribal exhaustion not required where "[t]he party seeking relief in federal court – Garcia – is not a member of the tribe that she is suing," and where "Garcia's theories of liability are grounded (if anywhere) on federal and state law, not 'tribal law.' This factor seems particularly important in light of the Supreme Court's recent opinion in *El Paso Natural Gas Co. v. Netzsosie*, 526 U.S. 473, 484 (1999)"); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993) (tribal exhaustion not required because "there has been no attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law"); *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 n.2 (9th Cir. 1991) ("exhaustion would not have assisted the district court in deciding federal law issues"), *cert. denied*, 505 U.S. 1212 (1992); *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F. Supp. 753, 754-55 (D.N.D. 1989) (tribal exhaustion of Title VII claims not required where there was no challenge to tribal court jurisdiction and case presented issues of predominantly federal law).

In this case, there were no practical reasons for requiring tribal exhaustion. Bank One's motions to compel arbitration implicated no interest in tribal self-government. They involved federal law – the FAA – not tribal law. Nor was a tribal court proceeding needed to develop an evidentiary record. The relevant jurisdictional facts were undisputed. The court of appeals failed to give any weight to these practical considerations, erroneously refusing to apply prudential principles of abstention. The Fifth Circuit opined:

> Bank One also argues that courts must apply the abstention principles included in *Colorado River* when considering tribal exhaustion. We disagree. The tribal exhaustion doctrine is in no way based on *Colorado River*.

Pet. App. 11a.

In so holding, the Fifth Circuit placed itself in direct conflict with this Court's decision in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), which described the tribal exhaustion doctrine as "analogous to principles of abstention" governing the state courts. *Id.* at 16 n.8. The Fifth Circuit also placed itself in conflict with decisions of other circuits faithfully following *Iowa Mutual*. *See, e.g., Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 80 (2d Cir. 2001) (tribal exhaustion doctrine is "analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)" and "must be interpreted narrowly in light of the 'virtually unflagging obligation of federal courts to exercise the jurisdiction given them,' *Colorado River*, 424 U.S. at 817").

5. *This Case Is an Ideal Vehicle To Resolve The Question Presented.*

This case is ideally suited for deciding the question presented. First, the Fifth Circuit, in a series of nineteen companion cases, has addressed the very same Bank One Arbitration Provision at issue here and has compelled arbitration of satellite dish claims asserted by state-court plaintiffs. *Bank One, N.A. v. Lake*, 2002 U.S. App. Lexis 7793 (5th Cir. Apr. 5, 2002) (unpublished); *Bank One, N.A. v. Coates* 125 F. Supp.2d 819, 833 (S.D. Miss. 2001), *aff'd without op.*, 2002 U.S. App. Lexis 7759 (5th Cir. Apr. 5, 2002). A bankruptcy court proceeding involving another member of the Choctaw tribe who filed the identical complaint as Respondents has reached the same conclusion. *Bank One, N.A. v. Chickaway (In re Chickaway)*, No. 97-10630 EEG (Bankr. S.D. Miss. Feb. 26, 2002).

Remitting the parties to tribal court would serve no purpose other than delay in this case because the dispute between these parties has been held to be arbitrable as a matter of federal law. There is thus no reason to force the parties to return to tribal court. *See Hicks*, 533 U.S. at 369 (tribal exhaustion doctrine does not apply where remitting parties to tribal court "would serve no purpose other than delay"); *Strate*, 520 U.S. at 459 n.14 (same).

The Fifth Circuit has also applied the holding of *Moses H. Cone* in this very context. The Fifth Circuit has held that a federal district court, faced with a motion to compel arbitration under the Bank One Arbitration Provision, may not defer to pending state-court satellite dish litigation in which the issue of arbitration could be raised. *Bank One, N.A. v. Boyd*, 2002 U.S. App. Lexis 6226 (5th Cir. Apr. 5, 2002). This Court is therefore faced with a concrete instance in which state courts hearing the same underlying satellite claims are treated less favorably than Indian tribal courts.

Because of the simultaneous pendency of state-court and bankruptcy court actions involving the very same arbitration clause, it is difficult to imagine a more fortuitous procedural posture in which to decide the question presented.

B. This Case Presents A Perfect Opportunity To Resolve Issues of Tribal Jurisdiction Left Open in *Nevada v. Hicks*.

This case also presents this Court with the opportunity to resolve important questions of tribal jurisdiction over non-members which were left open in *Nevada v. Hicks* but in which the Justices of this Court expressed substantial interest, as evidenced by the four separate concurring opinions filed in that case.

Here, the Fifth Circuit has held that a tribal court may exercise civil jurisdiction over nonmembers whenever the suit

arises from "'the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" Pet. App. 6a n.13 (quoting *Montana*, 450 U.S. at 565).

In *Hicks*, however, this Court called that very test into question. The Court pointedly noted that "we have never held that a tribal court had jurisdiction over a nonmember defendant." 533 U.S. at 358 n.2; *see also id.* at 374 (noting that the views of three Justices "would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court"). *Hicks* held that a tribal court could not exercise jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a member of the tribe suspected of having violated state law outside the reservation. This Court therefore reversed the Ninth Circuit's decision in *Hicks*, on which the district court in this case had relied in footnote 3 of its opinion to find a "colorable claim of tribal jurisdiction." *See* Pet. App. 21a & n.3.

This Court's *Hicks* opinion was "limited to the question of tribal-court jurisdiction over state officers enforcing state law" and left "open the question of tribal-court jurisdiction over nonmember defendants in general." 533 U.S. at 358 n.2. Nonetheless, this Court opined that "the general proposition" is "that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe' except to the extent 'necessary to protect tribal self-government or to control internal relations.'" 533 U.S. at 358-59 (internal citation omitted). "Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." *Id.* at 361. As examples of such laws, this Court cited such matters as "punishing tribal offenders, determining tribal membership, regulating domestic relations among members, [and] prescribing rules of inheritance." *Id.*

This Court should grant review in this case to resolve the question of tribal jurisdiction over nonmembers left open in *Hicks*. The Court should make clear that such jurisdiction may not be exercised except when necessary to protect tribal self-government or to control internal relations. *See Hicks*, 533 U.S. at 364 (tribal court jurisdiction over § 1983 suit "is not essential to tribal self-government or internal relations"); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650-51 (2001) ("Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes.") (citation omitted); *Strate*, 520 U.S. at 459 (tribal court lacked jurisdiction over suit arising from auto accident on Indian reservation, even though plaintiff was widow and mother of tribal members, because requiring defendants to defend "in a nonfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare'" of tribe). Indeed, some courts and commentators have gone even further and predicted that, in the wake of *Hicks*, nothing less than a clear congressional delegation of tribal jurisdiction will suffice to provide tribal courts with authority over nonmembers.[5]

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[5] *See United States v. Archambault*, 174 F. Supp. 2d 1009, 1011 (D.S.D. 2001) ("It can be argued that the opinion of the Supreme Court [in *Hicks*] is that any tribe's adjudicative jurisdiction over nonmembers is at most only as broad as the jurisdiction granted legislatively by Congress."); Alex Tallchief Skibine, *Making Sense out of Nevada v. Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 358 (2001) (arguing that the Court is "moving towards the principle that tribal jurisdiction over non-members would be allowed only if such jurisdiction had somehow been recognized or acquiesced to by Congress"); Alfred R. Light, *Sovereignty Myths and Intergovernmental Realities: the Etiquette of Tribal Federalism*, 14 ST. THOMAS L. REV. 373, 387-88 (2001) ("Though technically limited to the assertion of tribal authority over state officials, [the] prediction that 'the Court will soon refuse to recognize inherent tribal sovereign powers over non-members while on non-member lands without any indication that Congress would somehow support such tribal authority' seems almost certain after *Hicks*").

The Fifth Circuit's decision is in conflict with cases in the lower courts recognizing the more rigorous jurisdictional requirements in the wake of *Hicks*. In *Boxx v. Warrior*, 265 F.3d 771, 777-78 (9th Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 3056 (U.S. Apr. 29, 2002), for example, the Ninth Circuit held that a tribal court plaintiff's status as a member of the tribe "alone cannot satisfy" the jurisdictional requirements of tribal court. *Id.* at 778 n.4. The court of appeals, citing *Hicks*, held that tribal self-government was not implicated by a tort suit by a member of the tribe against a non-member for an alcohol-related auto accident. "'[T]he impact [on the tribe] must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the Tribe.'" *Id.* (quoting *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989)). "Even assuming that the Tribe possesses some regulatory and adjudicatory power over the sale and consumption of alcohol, the Tribe is not prevented in any way from exercising such authority by being denied the right to adjudicate this garden variety automobile accident." *Id.* at 778. *See also United States ex rel. Steele v. Turn Key Gaming, Inc.*, 260 F.3d 971, 979 n.8 (8th Cir. 2001) (citing *Hicks* for the proposition that "regulatory authority over nonmembers must 'be connected to that right of the Indians to make their own laws and be governed by them'"); *Hornell Brewing Company v. Seth Big Crow*, 133 F.3d 1087 (8th Cir. 1998) (tribal court lacked jurisdiction over defamation and intentional infliction of emotional distress claims against brewery for use of "Crazy Horse" name in alcoholic beverage); *Wilson v. Marchington*, 127 F. 3d 805, 814-15 (9th Cir. 1997) (tribal court lacked jurisdiction over tort suit by tribal member arising from a traffic accident with a non-Indian on U.S. highway within Indian reservation because requirement of bringing individual tort claims in state or federal court does not have a demonstrably serious effect or imperil political integrity, economic security or health and welfare of tribe); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM.

U.L. REV. 1177, 1191 (2001) ("*Atkinson Trading Co. v. Shirley* and *Nevada v. Hicks* cement the notion that Indian tribes only have jurisdiction over non-tribal members in extremely narrow circumstances.").

Tribal civil jurisdiction over nonmembers should not be lightly inferred. "[I]f jurisdiction exists non-Indians will have no representation in the government or councils of the tribes, but will be subjected to the demands of a separate sovereign within the boundaries of the United States itself." *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1223-24 (9th Cir. 2001) (Fernandez, J., dissenting). The mere fact that a nonmember of the tribe has allegedly entered into a commercial relationship with a tribal member should not provide a basis for tribal court jurisdiction, absent a demonstrable impact on tribal self-government or internal relations. In many cases, nonmembers will have no notice that they are dealing with a tribal member and hence are (under the Fifth Circuit's view) subject to tribal court jurisdiction. Certainly, Bank One had no notice that it would be haled into tribal court as a result of the transactions at issue. Bank One did not enter into a contract with the Choctaw Tribe. Nor could it reasonably have been aware of Respondents' tribal membership at the time any credit card agreements were executed. Respondents live on certain trust land parcels spread over several Mississippi counties. Appellees' Br. 11 (5th Cir.). Nothing in their addresses put Bank One on notice that they were members of the Choctaw Tribe. In fact, any such inquiry about an individual's race is prohibited by federal law. 15 U.S.C. § 1691, *et seq.* The credit card agreement provides that all disputes are to be governed by Ohio law and by applicable federal law – not by tribal law. Any exercise of tribal court jurisdiction based on the existence of the agreement would resemble the exercise of tribal jurisdiction based on the mere fact of tribal ownership of the land on which the cause of action allegedly arose, which *Nevada v. Hicks* held is not by itself sufficient to support tribal jurisdiction over nonmembers. 533

U.S. at 360.

In a concurring opinion in *Hicks*, Justice Souter, joined by Justices Kennedy and Thomas, explained at length why "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequences." 533 U.S. at 383. These concerns apply with special force to the Fifth Circuit's holding that an unsuspecting defendant may be haled into tribal court based purely on the unknown tribal membership of the plaintiff. For example, Justice Souter observed that "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Id.* "[T]here is a definite trend by tribal courts toward the view that they ha[ve] leeway in interpreting the . . . due process and equal protection clauses and need not follow the U.S. Supreme Court precedents 'jot-for-jot.'" *Id.* (internal quotations omitted). In light of the significant rights lost by a defendant when he is haled into tribal court, fair notice of the limits of tribal jurisdiction is necessary in order to satisfy the "overriding concern that citizens who are not tribal members be 'protected . . . from unwarranted intrusions on their personal liberty.'" *Id.* (citation omitted).

Accordingly, Justice Souter, joined by Justices Kennedy and Thomas, would have held in *Hicks* that there is a presumption that tribal court jurisdiction does not extend to nonmembers and that "land status within a reservation is not a primary jurisdictional fact." *Id.* at 375-76 (concurring opinion). "[A] jurisdictional rule under which land status was dispositive would prove extraordinarily difficult to administer and would provide little notice to nonmembers, whose susceptibility to tribal-court jurisdiction would turn on the most recent property conveyance." *Id.* at 383. "[T]ying tribes' authority to land status in the first instance would produce an unstable jurisdictional crazy quilt," which would make it difficult for "nonmembers to know where tribal jurisdiction begins and ends." *Id.*

The same lack of fair notice is a fatal defect in any

jurisdictional rule that turns on whether the counterpart in an arm's length commercial transaction is a member of a tribe. Just as "it defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction," *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n. 1 (2001) (citation omitted), so it defies common sense to suppose that a party in Bank One's position could reasonably be aware that it was subject to tribal jurisdiction.

The Court should grant review to establish that tribal court jurisdiction does not extend to claims against nonmembers, even in the context of commercial dealings, except where it is necessary to protect tribal self-government or to control internal relations. This Court should make clear that the portion of the *Montana* opinion on which the Fifth Circuit relied – which noted that "[a] tribe may regulate, through *taxation*, *licensing*, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," 450 U.S. at 565 – pertains to jurisdiction for *administrative* or *legislative* regulation rather than to jurisdiction for *judicial* authority and thus provides no support for the Fifth Circuit's decision in this case. Indeed, in *Hicks*, this Court reserved the question of whether, even if a nonmember would be subject to tribal regulation, he nonetheless might remain outside the adjudicatory authority of tribal courts. 533 U.S. at 374. This Court should grant review to make clear that the "doing business" or "contract" basis of tribal jurisdiction has been assimilated into the self-government test.[6]

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[6] Although Bank One takes the position that the imposition of tort damages for the financing of privately sold satellite dishes is not necessary to protect tribal internal relations, and thus that there is no tribal jurisdiction in this case as a matter of law, this Court could leave the question of the proper application of the jurisdictional test to the Fifth Circuit on remand.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should summarily reverse the Fifth Circuit's judgment, or GVR the case in light of *Hicks*.

Respectfully submitted.

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May 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

Consolidated Cases Nos. 01-60228, 01-60229, 01-60230, 01-60231, 01-60232, 01-60233, 01-60234, 01-60235, 01-60236, 01-60237, 01-60238

February 15, 2002

BANK ONE, N.A.,

PLAINTIFF-APPELLANT,

VERSUS

MYRA MAE SHUMAKE, DARLENE VAUGHN, ANDIA WILLIAMSON, KARREN SAM, VIRGINIA WILLIS, WILLIE WILLIS, LAVERN WILLIS, BRAINARD LEWIS, A/K/A BRIANARD LEWIS, ROBIN WILLIS, DANITA WILLIS, KIRBY WILLIS, DINA THOMAS AND ROSE WILLIS,

DEFENDANTS-APPELLEES.

Appeals from the United States District Court
for the Southern District of Mississippi

Before KING, Chief Judge, and DAVIS and MAGILL,* Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Bank One challenges the district court's dismissal of its suit to compel arbitration. Bank One contends that the reasoning of the U.S. Supreme Court's decision in *El Paso Natural Gas Co.*

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* Circuit Judge, U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

v. Neztsosie[1] requires us to conclude that the tribal exhaustion doctrine should not apply to suits to compel arbitration under the Federal Arbitration Act.[2] For the reasons that follow, we disagree. We therefore affirm the district court's order dismissing Bank One's action for failure to exhaust tribal remedies.

I.

In March 1995, a door-to-door salesman sold home satellite systems to several members of the Choctaw Indian tribe at their homes on the Choctaw Indian Reservation in Mississippi. The salesmen arranged to allow the purchaser to use credit provided by Bank One. Bank One required prospective purchasers ("Cardmembers") to complete and execute a Credit Application, accompanied by a Revolving Credit Card Plan and Disclosure Statement (the "Cardmember Agreement"), and a Security Agreement. The application provided that extensions of credit would be deemed to occur in Ohio.

In March 1998, Bank One contends it notified its Cardmembers of a modification to the Cardmember Agreement that inserted an arbitration clause requiring that all disputes be resolved by arbitration pursuant to the Federal Arbitration Act (FAA). Some members of the Tribe contend that they did not receive the modification.

In the summer of 2000, several members of the Mississippi Band of Choctaw Indians, including Myra Rae Shumake, sued Bank One in the Tribal Court of the Mississippi Band of Choctaw Indians ("Tribal Court") seeking damages and injunctive relief. The complaints alleged that Bank One financed the transaction through "bogus" credit cards, and that it concealed and failed to disclose material information regarding the credit transaction.

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[1] 526 U.S. 473, 119 S. Ct. 1430 (1999).

[2] 9 U.S.C. §§ 1-16.

Upon receipt of notice of the Tribal Court actions, Bank One promptly filed suits in the federal district court under § 4 of the FAA against each Cardholder seeking to compel arbitration of their Tribal Court claims, asserting that those claims are subject to a valid and binding arbitration agreement. The Cardholders immediately moved for dismissal of Bank One's district court action or remand to the Tribal Court, arguing that the tribal exhaustion doctrine requires federal courts to allow tribal courts to have the first opportunity to rule on the question of its jurisdiction. The district court found that the tribal exhaustion doctrine applied to these cases and dismissed Bank One's suits so that the Tribal Court could first address the question of its jurisdiction.

Bank One appeals the dismissals, contending that the district court inappropriately applied the tribal exhaustion doctrine to these FAA cases and that the arbitration clause in the contract waived any right to tribal exhaustion. The cases have been consolidated on appeal.

II.

The standard of review of district court decisions to stay or dismiss proceedings on abstention grounds is abuse of discretion, but to the extent that such a decision rests on an interpretation of law, our review is de novo.[3]

III.

A.

We turn first to Bank One's argument that the tribal exhaustion doctrine should be inapplicable to actions to compel

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[3] *See, e.g., Safety National Casualty Corp. v. Bristol-Myers Squibb Co.*, 214 F.3d 562, 564 (5th Cir. 2000); citing *Black Sea Inv. Ltd. v. United Heritage Corp*, 204 F.3d 647, 649-50 (5th Cir. 2000); *Murphy v. Uncle Ben's, Inc.*, 168 F.3d 734, 737 (5th Cir. 1999); *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 917 (5th Cir. 1997).

arbitration under the FAA. In considering this issue, we first review the Supreme Court cases on the tribal exhaustion doctrine.

The Supreme Court established the doctrine in *National Farmers Union Insurance Co. v. Crow Tribe*.[4] In that case, a Crow Indian minor was struck by a motorcycle in the parking lot of a school owned by the state, but located on the Crow Indian Reservation. The minor's parents sued the school district in tribal court and obtained a default judgment. The school district and its insurer then filed suit in federal court seeking an injunction against execution of the judgment and further proceedings in tribal court on the theory that the tribal court lacked subject matter jurisdiction in civil actions against non-tribe members under 28 U.S.C. § 1331. The district court granted the injunction, but a divided panel of the Ninth Circuit reversed.

The Supreme Court held that as a threshold matter, federal courts may determine whether a tribal court has exceeded its lawful jurisdiction because the extent of tribal sovereignty is a matter of federal law for the purposes of § 1331.[5] The Supreme Court held, however, that so long as "the action is not patently violative of express jurisdictional prohibitions,"[6] the first examination of tribal court jurisdiction should take place in the tribal court rather than in federal court.

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will

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[4] 471 U.S. 845, 105 S. Ct. 2447 (1985).

[5] *See id.* at 852-53.

[6] *Id.* at 857 n.21. The other two exceptions – bad faith or lack of opportunity to challenge the tribal court's jurisdiction – do not apply here.

> provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of ... [a] "procedural nightmare" ... will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made.[7]

The next important Supreme Court decision on the tribal exhaustion doctrine is *Iowa Mutual Insurance Co. v LaPlante*,[8] in which the Court extended the doctrine to diversity cases. In that case, LaPlante, a member of the Blackfeet Indian Tribe filed suit for personal injuries in tribal court against his employer, a ranch located on the Reservation. He also sued the ranch's insurer for bad faith refusal to settle. The tribal court ruled that once LaPlante amended his complaint to allege facts on which to base jurisdiction, it would entertain jurisdiction over the action. Iowa Mutual then sued the LaPlantes, the ranch, and its owners, in federal district court alleging diversity of citizenship under 28 U.S.C. § 1332 as the basis of jurisdiction, and seeking a declaration that it had no duty to defend or indemnify the ranch or its owners because the injuries fell outside the policy. The district court dismissed the action, holding that it lacked jurisdiction because the tribal court must be given the first opportunity to determine its own jurisdiction. The Ninth Circuit affirmed.

The Supreme Court concluded that the district court did not lack subject matter jurisdiction but that "the federal policy

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[7] *Id.* at 856-57.

[8] 480 U.S. 9, 107 S. Ct. 981 (1987).

supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'"[9] The Court noted that it had "repeatedly recognized the Federal Government's long-standing policy of encouraging tribal self-government.... Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development."[10] The Court extended the doctrine to diversity cases because when "state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, state courts are generally divested of jurisdiction as a matter of federal law."[11]

The Court held that the sovereignty of tribal courts can only be impaired by an express indication of Congressional intent. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal government, the proper inference from silence ... is that the sovereign power ... remains intact."[12] In response to the argument that the tribe lacked authority over non-members on the reservation, the Court responded that "tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."[13]

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[9] *Id.* at 16, quoting *National Farmers* at 857.

[10] *Id.* at 14, 107 S. Ct. at 975 (citations omitted).

[11] *Id.* at 15.

[12] 480 U.S. at 18, quoting *Merrion v. Ticarilla Apache Tribe*, 455 U.S. 130, 149 n.14, 102 S. Ct. 894 (1982).

[13] *Id.*, citing *Montana v. U.S.*, 450 U.S. 544, 565-66, 101 S. Ct. 1245 (1981). Although tribes usually do not have jurisdiction over non-Indians for activities off the reservation or Indian-fee land, *Montana* noted several exceptions. As a threshold inquiry under the tribal exhaustion doctrine, we must determine whether the tribal court's jurisdiction is explicitly limited. *Montana* limits it in many situations. One of its exceptions, however, applies here: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its

B.

This brings us to the most recent Supreme Court case, the primary basis of Bank One's argument. In *El Paso Natural Gas v. Neztsosie*,[14] two members of the Navajo Nation sued El Paso in tribal court for compensatory and punitive damages under Navajo tort law for injuries arising from exposure to radioactive and other hazardous materials. El Paso sued in the district court to enjoin the Neztsosies from pursuing their claims in tribal court. The district court denied the injunctions under the tribal exhaustion doctrine except to the extent that the claims fell under the Price-Anderson Act,[15] but allowed the tribal court to determine in the first instance whether the claims fell under Price-Anderson. The Ninth Circuit modified the order to permit the Tribal Court to resolve all issues.

The Supreme Court reversed as to the claims under the Price-Anderson Act and concluded that petitioners were not entitled to pursue their Price-Anderson Act claims in Tribal Court. The Court found that the case differed from *National Farmers* and *Iowa Mutual* because "by its unusual preemption provision,

> the Price-Anderson Act transforms into a federal action "any public liability action arising out of or resulting from a nuclear incident[.]" The Act not only gives a district court original jurisdiction over such a claim but provides for removal to a federal court as of right if a putative Price-Anderson action is brought in a state court. Congress thus expressed an unmistakable preference for a federal forum, at the behest of the defending party, both

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members, through commercial dealing, contracts, leases, or other arrangements." *Montana* at 565; *see also TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 684 (5th Cir. 1999).

[14] 526 U.S. 473 (1999).

[15] 42 U.S.C. § 2210.

> for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested.[16]

Given the preemptive scope of the Price-Anderson Act, the Court held that "any generalized sense of comity toward nonfederal courts is obviously displaced by the provisions for preemption and removal from state courts, which are thus accorded neither jot nor tittle of deference."[17] Accordingly, the Court found that "the comity rationale for tribal exhaustion normally appropriate to a tribal court's determination of its jurisdiction stops short of the Price-Anderson Act."[18]

Bank One contends that this decision significantly altered the legal landscape by severely restricting the tribal exhaustion doctrine. We disagree. The Supreme Court noted in *Neztsosie* that its ruling does *not* say

> that the existence of a federal preemption defense in the more usual sense would affect the logic of tribal exhaustion. Under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think that questions of federal preemption are any different. The situation here is the rare one in which statutory provisions for conversion of state claims to federal ones and removal to federal courts express congressional preference for a federal forum.[19]

Neztsosie therefore teaches that a federal court need not stay its hand pending tribal court adjudication under the Price-Anderson Act. This brings us to the question we must decide: Does the

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[16] 526 U.S. at 484 (internal citations omitted).

[17] *Id.* at 485-86.

[18] *Neztsosie*, 526 U.S. at 487.

[19] 526 U.S. at 485 n.7 (internal citation omitted).

FAA have the pre-emptive force of the Price-Anderson Act, thereby displacing comity considerations underlying the tribal exhaustion doctrine?

Although the FAA reflects a strong policy favoring the enforcement of arbitration clauses,[20] unlike the Price-Anderson Act, the FAA does not provide an independent ground of federal jurisdiction. To sue in federal court to enforce an arbitration claim, a petitioner must demonstrate the existence of federal subject matter jurisdiction on the *underlying* contract claim.[21] As a result, suits to compel arbitration may only be brought in federal court if diversity of citizenship or a federal question exists.[22]

Also, federal substantive law under the FAA only applies to contracts involving three types of transactions: (1) transactions in interstate commerce, (2) transactions in foreign commerce, or (3) maritime transactions. Otherwise state substantive law applies.[23] Even if FAA substantive law applies, federal courts must still use state contract law to fill the gaps not covered by federal law.[24] If a plaintiff can find no subject matter jurisdiction

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[20] *See, e.g., Grigson v. Creative Artists Agency*, 210 F.3d 524, 526 (5th Cir. 2000) ("Arbitration is favored in the law."), citing *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 24-25, 103 S. Ct. 927 (1983).

[21] "A party aggrieved ... may petition any United States district court *which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties*, for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

[22] Diversity of citizenship is the most common basis of jurisdiction. See Wright & Miller, 13B FEDERAL PRACTICE AND PROCEDURE 172 (1984).

[23] 9 U.S.C. § 2.

[24] *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (state contract law and defenses); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989) (state procedural rules). In the application of state law, however, "due regard must

in federal court to enforce his right to arbitrate under the FAA, he must rely on the state court to enforce these rights.[25] The Supreme Court commented on this arrangement in *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*:

> The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction.... Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute.... Although enforcement of the Act is left in large part to the state courts, it nevertheless represents federal policy to be vindicated by the federal courts where otherwise appropriate.[26]

The FAA may be further distinguished from Price-Anderson because, as *Neztsosie* observes, Price-Anderson provides for a federal forum to decide the merits of a controversy, whereas under the FAA, the merits will be decided by arbitration.

In sum, while the FAA does reflect a policy strongly favoring the enforcement of arbitration clauses, it does not reflect a congressional intent for federal courts to occupy the entire field

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be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996), quoting *Volt*, 489 U.S. at 488.

[25] *Commercial Metals Co. v. Balfour, Guthrie, & Co.*, 577 F.2d 264, 269 (5th Cir. 1978) ("It is clear that the state courts are entirely able, as well as required, to apply the United States Arbitration Act and compel arbitration pursuant to the Act if the statutory requisites are present.")

[26] 460 U.S. 1, 26 n. 32, 103 S. Ct. 927, 942 n. 32 (1983) (internal citations omitted).

of arbitration law.[27]

After examining the two statutes, we agree with the district court that

> Congress has not expressed an intent to provide a federal forum for all suits to compel arbitration, but has instead extended a federal forum only to those suits for which there is otherwise an independent basis for federal jurisdiction; the FAA itself confers no jurisdiction on the federal courts.... In this case, then, in contrast to the "rare" situation presented in *Neztsosie*, Bank One would have no "right" to a federal forum in the absence of diversity jurisdiction.... Here the jurisdictional basis for Bank One's complaint is not the FAA at all, but diversity of citizenship jurisdiction, which alone is not a sufficient basis to override the federal policy of deference to tribal courts.

C.

Bank One also argues that courts must apply the abstention principles included in *Colorado River*[28] when considering tribal exhaustion. We disagree. The tribal exhaustion doctrine is in no way based on *Colorado River*. *Iowa Mutual's* reference to the *Colorado River* doctrine as another comity-based abstention doctrine does not suggest that the *Colorado River* principles apply to a tribal exhaustion case.[29] The district court correctly distinguished the two abstention doctrines, on the ground that the *Colorado River* doctrine "proceeds from the premise that 'the federal courts have a virtually unflagging obligation ... to exercise the jurisdiction given them'" and that therefore, the

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[27] See *Volt*, 489 U.S. 468, 109 S. Ct. 1248.

[28] *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 96 S. Ct. 1236 (1976).

[29] See *Iowa Mutual*, 480 U.S. at 16 n.8.

pendency of litigation in state court is not a bar to proceedings in federal court involving the same subject matter in the absence of "exceptional circumstances."[30] The policy which animates the tribal exhaustion doctrine, however, "subordinates the federal court's obligation to exercise its jurisdiction to the greater policy of promoting tribal self-government."[31] *Colorado River* abstention is thus the exception to the rule, whereas tribal exhaustion is the rule rather than the exception. The latter is the appropriate doctrine to apply here.

IV.

A.

Relying on *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,[32] Bank One also contends that the arbitration clause waives tribal exhaustion. In *C&L*, the Potawatomi Indian Tribe contracted with C&L to install a roof on a building owned by the Tribe off the reservation. The contract at issue in the case included an arbitration clause and a choice of law clause. When the Tribe decided to change the roofing material and sought new bids, C&L submitted an arbitration demand claiming that the Tribe had breached the contract. The Tribe asserted sovereign immunity and refused to participate in the arbitration. The arbitrator awarded damages to C&L, which then sought enforcement in state court. The tribe asserted its immunity again. The state court denied the motion and confirmed the award and the state appellate court affirmed.

The Supreme Court vacated and remanded the case to the state court. The Court held that when a tribe consents to dispute

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[30] *Bank One*, 144 F. Supp. 2d at 649.

[31] *Id.*

[32] 532 U.S. 411, 121 S. Ct. 1589 (2001).

resolution by arbitration, it waives its sovereign immunity.[33]

Bank One argues that if a tribe, by agreeing to an arbitration clause waives sovereign immunity, such an agreement must also waive tribal exhaustion. We need not decide this issue because in the instant case the Tribe was not a party to the contract. The litigation in *C&L* involved a contract between a bank and a tribe, rather than a contract between a bank and individual members of a tribe. We decline to extend *C&L* to contracts between commercial entities and individual tribe members which would have the effect of allowing individual members of a tribe to waive tribal exhaustion.

B.

Bank One further argues that decisions by other circuits that find forum selection clauses to waive tribal exhaustion should extend to arbitration clauses.[34] The arbitration clause at issue in this case does not select a judicial forum for resolution of disputes. An arbitration clause that attempts to foreclose any and all access to courts bears little resemblance to a forum selection clause, and the cases appellant relies upon have no application to this case.

V.

For the reasons stated above, the district court's order dismissing Bank One's suit to compel arbitration for failure to

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[33] *Id.* at 1594-95.

[34] *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993); *F.G.S. Constructors, Inc. v. Carlow*, 64 F.3d 1230 (8th Cir. 1995). For the opposite approach, *see, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 33 (1st Cir.2000); *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2nd Cir. 1997). *Altheimer & Gray* may be distinguishable from the instant case at least insofar as its decision that tribal exhaustion was not necessary was based on the lack of a pending tribal action or a challenge to tribal court jurisdiction. *See, Altheimer & Gray*, 983 F.2d at 814.

exhaust tribal remedies is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

February 20, 2001

BANK ONE, N.A., PLAINTIFF

VS. Civil Action No. 4:00CV132LN

LEWIS BRAINARD, DEFENDANT

MEMORANDUM OPINION AND ORDER

Defendant Lewis Brainard has filed a motion to remand or, alternatively, dismiss on the basis of the tribal exhaustion doctrine, which motion is opposed by plaintiff Bank One, N.A. Having considered the memoranda of authorities, together with attachments, submitted by the parties, the court concludes that the tribal exhaustion doctrine does apply, and that therefore, this case should be dismissed.

The facts pertinent to the present motion are, briefly, as follows. On July 11, 2000, defendant, a duly enrolled member of the Mississippi Band of Choctaw Indians, filed suit against Bank One in the Tribal Court of the Mississippi Band of Choctaw Indians (Tribal Court) seeking damages and injunctive relief based on allegations of improper conduct on the part of Bank One in connection with its financing of a home satellite system purchased by defendant. Specifically, defendant alleged that in March 1995, when a door-to-door salesman came to his home on the Choctaw Indian Reservation attempting to sell him a home satellite system, he agreed to purchase the system based on the

salesman's representations as to the cost and terms of financing. He charged, however, that the representations were false and fraudulent, and contended, more particularly, that Bank One, financed the transaction through a "bogus" credit card, and that it concealed and fraudulently failed to disclose material information regarding the credit transaction, including the nature of the credit, the number of payments, the amount of each payment, the amount financed, the total finance charge, the total of payments and the total sales price.

Upon receiving notice of the Tribal Court action, Bank One promptly filed its complaint in this court under § 4 of the Federal Arbitration Act (FAA), 9 U.S.C. § 4, seeking to compel arbitration of defendant's claims, asserting that the claims advanced by defendant against Bank One in Tribal Court are subject to a valid and binding arbitration agreement which is a part of defendant's credit card agreement with Bank One. Immediately upon being served with process in this action, defendant moved the court to dismiss the case, or to remand it to Tribal Court, to which subject matter jurisdiction is clearly conferred by the Choctaw Tribal Code, § 1-2-5(2), since he is a duly enrolled member of the Mississippi Band of Choctaw Indians and lives within the exterior boundaries of the Choctaw Indian Reservation, and since the claims giving rise to his cause of action against Bank One occurred wholly within the exterior boundaries of the Choctaw Indian Reservation. Defendant submits that if there were any doubt as to the Tribal Court's jurisdiction, then pursuant to the tribal exhaustion doctrine, this court would be obliged to allow the Tribal Court to have the first opportunity to rule on the question of its jurisdiction. The court agrees, and concludes that the case should be dismissed so that the parties may present their positions for consideration by the Tribal Court.

Under the tribal exhaustion rule, as formulated by the Supreme Court in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818

(1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987), "when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims." *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 31 (1st Cir. 2000); *see also Bowen v. Doyle*, 230 F.3d 525, 529 (2d Cir. 2000) ("when the jurisdiction of the tribal court is challenged, 'the Tribal Court itself' must be permitted to determine the issue 'in the first instance.'") (quoting *National Farmers*, 471 U.S. at 856, 105 S. Ct. 2447); *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 65 (2d Cir. 1997) (under the doctrine of exhaustion of tribal remedies, "parties who challenge, under federal law, the jurisdiction of a tribal court to entertain a cause of action must first present their claim to the tribal court before seeking to defeat tribal jurisdiction in any collateral or parallel federal court proceeding.").

The tribal exhaustion requirement is not jurisdictional, but rather is a "prudential" rule pursuant to which a federal court, in view of comity considerations, "should to stay its hand 'until after the Tribal Court has had a full opportunity to determine its own jurisdiction.'" *Strate v. A-1 Contractors*, 520 U.S. 438, 449, 117 S. Ct. 1404, 1411, 137 L. Ed. 2d 661 (1997) (quoting *National Farmers*, 471 U.S. at 857, 105 S. Ct. at 2454); *Iowa Mutual*, 480 U.S. at 16 n.8, 107 S. Ct. at 976 n.8 (stating that "exhaustion is required as a matter of comity, not as a jurisdictional prerequisite"). This rule is based on "the Federal Government's longstanding policy of encouraging tribal self-government," *Iowa Mutual*, 480 U.S. at 14, 107 S. Ct. at 975, and "reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory' to the extent that sovereignty has not been withdrawn by federal statute or treaty," *id.*, at 14, 107 S. Ct. at 975 (quoting *United States v.*

Mazurie, 419 U.S. 544, 557, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975)); *see also National Farmers*, 471 U.S. at 856, 105 S. Ct. at 2454 ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination."). Thus, while the federal courts ultimately have jurisdiction to determine the limits of a tribal court's jurisdiction, the tribal exhaustion rule holds that tribal courts, which "play a vital role in tribal self-government," must be permitted the first opportunity to resolve challenges to their jurisdiction without federal court interference.[1] *Iowa Mutual*, 480 U.S. at 14, 107 S. Ct. at 976; *Strate*, 520 U.S. at 451, 117 S. Ct. at 1412 (Court in *Iowa Mutual* held that "respect for tribal self-government made it appropriate 'to give the tribal court a "full opportunity to determine its own jurisdiction."'"); *Basil Cook Enters.*, 117 F.3d at 65 (noting that the exhaustion requirement "promotes tribal autonomy and dignity"). This is so whether the federal court's jurisdiction is sought to be invoked on the basis of a federal question under 28 U.S.C. § 1331, or diversity of citizenship under § 1332. *See Strate*, 520 U.S. at 451, 117 S. Ct. at 1412 (respect for tribal self-government "[is] equally in order whether federal-court jurisdiction rest[s] on § 1331 (federal question) or on § 1332 (diversity of citizenship)"); *Iowa Mutual*, 480 U.S. at 16, 107 S. Ct. at 976 ("In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."); *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1993) (tribal exhaustion rule provides that "as a matter of

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[1] The Court in *National Farmers* held that "the question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." *National Farmers*, 471 U.S. at 852-53, 105 S. Ct. at 2452 ("The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.").

comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies.").[2]

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[2] The Supreme Court most recently addressed the tribal exhaustion doctrine in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 483-84, 119 S. Ct. 1430, 1436-37, 143 L. Ed. 2d 635 (1999), and summarized its earlier decisions on the subject, as follows:

> *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985), was a suit involving the federal-question jurisdiction of a United States District Court under 28 U.S.C. § 1331, brought to determine "whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians," *id.*, at 855, 105 S. Ct. 2447. We held, initially, that federal courts have authority to determine, as a matter "arising under" federal law, *see* 28 U.S.C. § 1331, whether a tribal court has exceeded the limits of its jurisdiction. *See* 471 U.S. at 852-853, 105 S. Ct. 2447. After concluding that federal courts have subject-matter jurisdiction to entertain such a case, we announced that, prudentially, a federal court should stay its hand "until after the Tribal Court has had a full opportunity to determine its own jurisdiction." *Id.*, at 857, 105 S. Ct. 2447. In justification of a prudential requirement of tribal exhaustion, we stated that "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions," *id.*, at 855-856, 105 S. Ct. 2447 (footnote omitted). The same "considerations of comity," *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987), provided the rationale for extending the doctrine to cases where a defendant in tribal court asserts federal-diversity jurisdiction in a related action in district court. *Id.*, at 16, 107 S. Ct. 971. Exhaustion was appropriate in each of those cases because "Congress is committed to a policy of supporting tribal self-government ... [which] favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *National Farmers Union Ins. Cos., supra*, at 856, 105 S. Ct. 2447.

The tribal exhaustion doctrine is, not, however, applicable to every case to which a tribe or a tribe member is a party, and thus it must be determined whether the circumstances of this case are such as to invoke the requirement of tribal exhaustion. In *Iowa Mutual*, the Court explained that because "'tribal authority over the activities of non-Indians on [nonalienated] reservation lands is an important part of tribal sovereignty,' . . . 'civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.'" *Iowa Mutual*, 480 U.S. at 18, 107 S. Ct. at 977; *see also Williams v. Lee*, 358 U.S. 217, 223, 79 S. Ct. 269, 272, 3 L. Ed. 2d 251 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Ninigret Dev. Corp.*, 207 F.3d at 32 ("Civil disputes arising out of the activities of non-Indians on reservation lands almost always require exhaustion if they involve the tribe (or a tribe member)."). And although there is generally no tribal jurisdiction over non-Indians for activities off the reservation or on non-Indian fee lands in the absence of a federal statute or treaty granting such authority, *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), there are specific circumstances in which such jurisdiction does exist:

> A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-66. *See TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 684 (5th Cir. 1999) (recognizing that while "[a] tribal court

generally does not have jurisdiction over non-Indian defendants[,] [a] tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements" unless the civil jurisdiction of the tribal courts has been limited by congressional act) (citations omitted).

In this case, defendant has advanced the requisite colorable claim of tribal jurisdiction, since the activities of which he complains not only occurred on the reservation, but also involve the formation of an ostensible consensual relationship between Bank One and a member of the tribe.[3] Nevertheless, in response to defendant's motion, Bank One maintains that the tribal

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[3] In *Strate v. A-1 Contractors*, 520 U.S. 438, 449, 117 S. Ct. 1404, 1411 (1997), the Supreme Court held that in cases in which "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct [and in such cases] state or federal courts will be the only forums competent to adjudicate those disputes." *Id.* at 459-60, 117 S. Ct. at 1416. In those cases, "the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay." *Id.* at 459-60, 117 S. Ct. at 1416.

This is not such a case, for this case, which involves events occurring on nonalienated land on the reservation and which implicates one of the two *Montana* exceptions, does not fall within *Montana's* "main rule," which holds that there is no tribal jurisdiction over non-Indians for activities on non-Indian fee lands in the absence of a federal statute or treaty granting such authority. *See State of Nevada v. Hicks*, 196 F.3d 1020, 1024-27 (9th Cir. 2000) (recognizing "'a strong geographic component' distinguishing incidents occurring on Indian-owned land from those on non-Indian owned land," and concluding that "where the incidents underlying the . . . case occurred on Indian-owned, Indian-controlled land, over which the Tribe retained its right to exclude non-members," the applicable rule was that of *Williams v. Lee*: "where the underlying incidents occur on Indian-owned land, tribal court jurisdiction is presumed unless affirmatively limited by an act of Congress.") (citing *Williams v. Lee*, 358 U.S. 217, 222, 79 S. Ct. 269 (1959), in which the Court stated that it had "consistently guarded the authority of Indian governments over their reservations.... If this power is to be taken away from them, it is for Congress to do it.").

exhaustion doctrine does not apply because this case does not involve a challenge to the Tribal Court's jurisdiction; rather, this suit seeks simply to compel defendant to pursue his claims through arbitration as provided under § 4 of the FAA and thus, according to Bank One's characterization, raises only questions of federal law that do not involve tribal sovereignty or implicate the tribal exhaustion doctrine.

The line claimed by Bank One to separate the two suits, however, is not so apparent to the court. On the contrary, it is manifest to the court that, directly or not, the relief sought by Bank One in this case would undeniably undermine the tribal court's authority to determine its jurisdiction. That is because, while the relief demanded by Bank One is an order compelling arbitration, a concomitant goal, or a necessary byproduct of this suit, is to foreclose the Tribal Court from further consideration of defendant's claims for relief.[4] This is, then, in the court's opinion, properly viewed as a challenge to the Tribal Court's jurisdiction which implicates considerations of tribal exhaustion. *See Basil Cook Enters.*, 117 F.3d at 63 (characterizing suit to enjoin proceedings before a tribal court and to compel arbitration in connection with a management agreement governing the operation of a gambling establishment on tribal lands as a "federal challenge to the jurisdiction of the Tribal Court," to which the tribal exhaustion doctrine applied).

In a related vein, Bank One, noting that the tribal exhaustion doctrine is based upon principles of comity, not jurisdiction, argues that because Congress has expressly authorized suits to compel arbitration to be brought in federal district court and has

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[4] Indeed, were this court to entertain the suit and grant Bank One's request to compel arbitration, then if the defendant were to resist arbitration and continue to pursue his claims in the tribal forum, Bank One's next step presumably would be to seek an order enjoining further proceedings in the Tribal Court – which would be a direct challenge to the Tribal Court's jurisdiction.

thus given litigants seeking to compel arbitration "an unfettered right" to relief in a federal forum, it thus follows that this court has no discretion and may not abstain from exercising its jurisdiction. It submits, in other words, that by mandating a federal forum for all suits to compel arbitration, Congress has affirmatively limited tribal court jurisdiction over such suits. Bank One's argument in this regard is not well taken.

In *National Farmers*, the Supreme Court identified three narrow situations in which the tribal exhaustion rule would not require litigants to first press their jurisdictional arguments in tribal court: "[1] where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or [2] where the action is patently violative of express jurisdictional prohibitions, or [3] where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers*, 471 U.S. at 856 n.21, 105 S. Ct. at 2454 n.21 (citation and internal quotations omitted); *see also Iowa Mutual*, 480 U.S. at 19 n.12, 107 S. Ct. at 978 n.12. Later, in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 119 S. Ct. 1430, 143 L. Ed. 2d 635 (1999), the Court, without referencing the *National Farmers* exceptions specifically, ruled that the doctrine of exhaustion of tribal remedies did not apply to claims brought in tribal court under the Price-Anderson Act,[5] reasoning that "the situation there [involving a Price-Anderson Act claim was] the rare one in which [the Price-Anderson Act's] [unusual] statutory provisions for conversion of state claims to federal ones [resembling complete preemption] and removal to federal courts expressed [an unmistakable] congressional

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[5] The Price-Anderson Act grants "United States district courts original and removal jurisdiction over all 'public liability actions,' . . . 42 U.S.C. § 2210(n)(2), defined as suits 'asserting public liability,' § 2014(hh), which 'shall be deemed to be ... action[s] arising under' § 2210. The Act . . . provides the mechanics for consolidating such actions, § 2210(n) (2), for managing them once consolidated, § 2210(n)(3), and for distributing limited compensatory funds, § 2210 (o)." *Neztsosie*, 526 U.S. at 477, 119 S. Ct. at 1433-34.

preference for a federal forum."[6] *Neztsosie*, 526 U.S. at 486, 119 S. Ct. at 1438.

Bank One has not contended that any of the three *National Farmers* exceptions apply, but instead, citing *Neztsosie*, argues that the tribal exhaustion rule is not applicable here because § 4 of the FAA, like the Price-Anderson Act, reflects an "unmistakable preference" for a federal forum for suits to compel arbitration. *See* 9 U.S.C. § 4 ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."). The court finds no

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[6] The Court explained,

> By its unusual preemption provision, see 42 U.S.C. § 2014(hh), the Price-Anderson Act transforms into a federal action, "any public liability action arising out of or resulting from a nuclear accident," § 2210(n)(2). The Act not only gives a district court original jurisdiction over such a claim, *see ibid.*, but provides for removal to a federal court as of right if a putative Price-Anderson action is brought in a state court, *see ibid.* Congress thus expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested.
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> . . .
>
> We are at a loss to think of any reason that Congress would have favored tribal exhaustion. Any generalized sense of comity toward nonfederal courts is obviously displaced by the provisions for preemption and removal from state courts, which are thus accorded neither jot nor tittle of deference. The apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal – as to state – court litigation.

Neztsosie, 526 U.S. at 485-86, 119 S. Ct. at 1438.

merit in Bank One's position.[7]

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[7] It is not clear to this court whether the Court in *Neztsosie* was simply in substance (though not in name) applying the *National Farmers* "patently violative of express jurisdictional prohibitions" exception. What the Court did was examine the Price-Anderson Act provisions and legislative history to determine whether Congress intended to remove from tribal courts, in addition to state courts, jurisdiction over Price-Anderson Act claims, which is the relevant inquiry under the second *National Farmers* exception. If the Court was undertaking to apply the *National Farmers* exception, however, the standard which the Court articulated, i.e., "unmistakable preference," is arguably less stringent than at least some courts had interpreted the "patently violative of express jurisdictional prohibitions" exception. For example, in *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1502 (10th Cir. 1997), the Tenth Circuit defined the *National Farmers* exception as follows:

> A substantial showing must be made by the party seeking to invoke this exception to the tribal exhaustion rule. In fact, tribal courts rarely lose the first opportunity to determine jurisdiction because of an "express jurisdictional prohibition." Cases in which tribal courts are not given the first opportunity to determine their jurisdiction typically involve situations where the federal court has exclusive jurisdiction, or where tribal jurisdiction is foreclosed by sovereign immunity.

Id. (citations omitted). *See also Basil Cook Enters.*, 117 F.3d at 67 ("Exhaustion will be excused under the 'patently violative of express jurisdictional prohibitions' exception only in those rare cases when a tribal court's civil jurisdiction is found by a federal court to be in patent violation of express federal law."); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 684 (5th Cir. 1999) (holding that statute which did not "create exclusively federal jurisdiction" did not "overcome the presumption of concurrent . . . (tribal) jurisdiction."); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989) (exhaustion of tribal remedies with respect to claim brought under section 6972(a)(1) of the Resource Conservation and Recovery Act was not required where the Act placed exclusive jurisdiction over such claims in federal court). The court notes, though, that at least one court has interpreted *Neztsosie* as finding exclusive federal jurisdiction under the Price-Anderson Act and thus finding more than a mere "preference" for federal jurisdiction. *See infra* n.8.

In any event, regardless of how the *National Farmers* exception is understood, or how *Neztsosie* is construed, this case is not one of the "rare"

Contrary to Bank One's insinuation, Congress has not expressed an intent to provide a federal forum for all suits to compel arbitration, but has instead extended a federal forum only to those suits for which there is otherwise an independent basis for federal jurisdiction; the FAA itself confers no jurisdiction on the federal courts. As this court recognized in *Bank One v. Harris*, 2001 U.S. Dist. LEXIS 9615, No. 3:00CV665LN (S.D. Miss. Jan. 2, 2001),

> Although the Federal Arbitration Act expressly authorizes the filing of petitions to compel arbitration in federal district courts, the FAA treats arbitration simply as one means of resolving disputes that lie within the jurisdiction of the federal courts, *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 291, 115 S. Ct. 834, 848, 130 L. Ed. 2d 753 (1995), and does not itself grant the federal courts subject matter jurisdiction, *id.*; therefore, an action brought in federal court to compel arbitration requires an independent basis for federal jurisdiction, such as federal question or diversity jurisdiction, *Specialty Healthcare Mgt., Inc. v. St. Mary Parish Hosp.*, 220 F.3d 650, 653 (5th Cir. 2000) (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 942 n.32, 74 L. Ed. 2d 765 (1983)); *Atlantic Aviation, Inc. v. E.M. Group, Inc.*, 11 F.3d 1276, 1280 (5th Cir. 1984).

In this case, then, in contrast to the "rare" situation presented in *Neztsosie*, Bank One would have no "right" to a federal forum in the absence of diversity jurisdiction.[8] And in the court's opinion,

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cases excepted from application of the tribal exhaustion doctrine.

[8] In *Kerr-McGee Corp. v. Farley*, 88 F. Supp. 2d 1219, 1227 n.2 (D.N.M. 2000), the court expressed that it was "troubled about the possibility that the *Neztsosie* holding may be used to chip away at established tenants of tribal sovereignty," but was ultimately able to reconcile *Neztsosie* with the tribal exhaustion doctrine, as enunciated in *National Farmers* and *Iowa Mutual*, by

reading *Neztsosie* as finding exclusive federal jurisdiction over Price-Anderson Act claims. The court explained:

> Other courts that have considered the general question of the scope of jurisdiction under the 1988 PAA amendments have found that Congress intended to create exclusive federal cause of action for torts arising out of nuclear incidents. Although these courts found exclusive federal jurisdiction in the context of removal from state court, this Court believes that in light of the *Neztsosie* ruling, this exclusive federal jurisdiction must apply to tribal courts as well where a defendant seeks a federal forum. Furthermore, the Ninth Circuit, in *State v. Hicks*, analyzed *Neztsosie* as holding that "the Price-Anderson act preempted the injury claims, requiring that actions be brought only in federal court." 196 F.3d 1020, 1026 (1999).

Id. (citations omitted). The court reasoned that its conclusion that the Price-Anderson claims before it were not subject to tribal exhaustion was "not inconsistent with *Iowa Mutual*, in which the Supreme Court held that tribal civil jurisdiction over the activities of non-Indians on tribal lands remains intact unless 'affirmatively limited by a specific treaty provision or federal statute[,]' 480 U.S. at 18, 107 S. Ct. 971," 88 F. Supp. 2d at 1232, because,

> the Supreme Court in Neztsosie found that Congress intended to affirmatively limit non-federal adjudication of PAA actions, stating "any generalized sense of comity toward nonfederal courts is obviously displaced by the provisions for preemption and removal from state court. The apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal – as to state – court litigation." 526 U.S. at 485-86, 119 S. Ct. 1430. This combination of the preference for a federal forum and the absence of comity concerns weighs heavily in favor of concluding that the PAA affirmatively creates exclusive federal jurisdiction over PAA claims at the request of the defendant, and conversely limits tribal jurisdiction over such cases. This Court's holding does not undermine the basic tenants of Indian tribal jurisdiction which hold that absent clear intent by Congress, tribal jurisdiction is presumed. *See National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818; *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10. Rather, this Court finds only that Congress has expressed its clear intent for

congressional authorization for filing suit to compel arbitration in federal court only if there is an independent basis for federal jurisdiction is not a sufficient basis upon which to conclude that Congress intended to exclude a tribal court from exercising jurisdiction. Here, the jurisdictional basis for Bank One's complaint is not the FAA at all, but diversity of citizenship jurisdiction, which alone is not a sufficient basis to override the federal policy of deference to tribal courts.[9] *See Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 n.16 (9th Cir. 1989) (implicitly rejecting argument

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> exclusive jurisdiction applicable both to state and tribal courts in the particular context of the PAA, where Congress has created a federal cause of action, complete with venue, consolidation and case management provisions and where the Supreme Court has stated in *Neztsosie* that such preference for a federal forum should apply with equal force to both tribal and state courts.

88 F. Supp. 2d at 1232; *see also Armstrong v. Mille Lacs County Sheriffs Dept.*, 112 F. Supp. 2d 840, 844 (D. Minn. 2000) (citing *Neztsosie*, and observing that "where Congress has entrusted a particular cause of action to the exclusive jurisdiction of the Federal Courts, then the Court need not defer to a Tribal Court, in that instance, to determine its jurisdiction to resolve the merits of the claim.").

[9] In rejecting an argument that the statutory grant of diversity jurisdiction was sufficient to override the federal policy of deference to tribal courts, the Court in *Iowa Mutual*, 480 U.S. at 17-18, 107 S. Ct. at 977, stated,

> Although Congress undoubtedly has the power to limit tribal court jurisdiction, we do not read the general grant of diversity jurisdiction to have implemented such a significant intrusion on tribal sovereignty, any more than we view the grant of federal-question jurisdiction, the statutory basis for the intrusion on tribal jurisdiction at issue in *National Farmers Union*, to have done so. The diversity statute, 28 U.S.C. § 1332, makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government. . . . Congress has amended the diversity statute several times since the development of tribal judicial systems, but it has never expressed any intent to limit the civil jurisdiction of the tribal courts.

that strong federal policy favoring arbitration should overcome the policy of comity in favor of the tribal court, and observing that "particularly since the validity of the arbitration clauses in the contracts are themselves in dispute, Stock West's argument that the federal courts should not defer to the tribal court is weak."); *Calumet Gaming Group-Kansas, Inc. v. The Kickapoo Tribe of Kansas*, 987 F. Supp. 1321, 1328 (D. Kan. 1997) (concluding that National Farmers exception did not apply to suit to compel arbitration since FAA "does not expressly limit tribal court jurisdiction. Presumably, the tribal court could enforce the FAA as well as the federal courts.").

In its effort to avoid a tribal forum, Bank One devotes considerable attention in its responsive memorandum to the *Colorado River* abstention doctrine, arguing that the abstention criteria established in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), which it submits "must be applied by a court when considering the tribal exhaustion doctrine," weighs decidedly against requiring tribal exhaustion. The undersigned, however, does not agree that a determination of whether the tribal exhaustion rule applies in a given case is to be made by reference to the *Colorado River* factors. The Court did not so hold in *Iowa Mutual* – contrary to Bank One's contention. Instead, the Court merely noted that the tribal exhaustion/abstention rule "is analogous to principles of abstention articulated in *Colorado River*," and remarked that "in *Colorado River*, as here, strong federal policy concerns favored resolution in the nonfederal forum," *Iowa Mutual*, 480 U.S. at 16 n.8, 107 S. Ct. at 976 n.8.

The fact that the Supreme Court did not even allude to *Colorado River* when it formulated the tribal exhaustion rule in *National Farmers*, and that the Court in *Iowa Mutual* merely referenced *Colorado River* abstention but did not purport to apply that doctrine, strongly belies Bank One's conclusion that the *Colorado River* doctrine applies in the context of tribal

exhaustion. Moreover, while the tribal exhaustion and Colorado River abstention doctrines have in common the fact that both are comity-based, premised on respect for another court system, there is a fundamental difference in the policy considerations which inform application of the doctrines. The *Colorado River* doctrine proceeds from the premise that "the federal courts have a 'virtually unflagging obligation ... to exercise the jurisdiction given them'" and that therefore, the pendency of litigation in state court is not a bar to proceedings in federal court involving the same subject matter in the absence of "exceptional circumstances." *Colorado River*, 424 U.S. at 817, 96 S. Ct. at 1246. The policy which animates the tribal exhaustion rule is quite different, as it subordinates the federal court's obligation to exercise its jurisdiction to the greater policy of promoting tribal self-government. *See Iowa Mutual*, 480 U.S. at 14, 107 S. Ct. 975. Thus, in contrast to *Colorado River*, under which abstention is the exception rather than the rule, deference to tribal courts pursuant to the tribal exhaustion doctrine is the rule rather than the exception. *See Iowa Mutual*, 480 U.S. at 22, 107 S. Ct. at 980 (Stevens, J., concurring in part and dissenting in part) ("Until today, we have never suggested that an Indian Tribe's judicial system is entitled to a greater degree of deference than the judicial system of a sovereign state. Today's opinion, however, requires the federal court to avoid adjudicating the merits of a controversy also pending in tribal court although it could reach those merits if the case instead were pending in state court."); cf. Patti Alleva *et al.*, *Dispute Resolution in Indian Country: Does Abstention Make the Heart Grow Fonder*?, 71 N.D. L. REV. 541, 548-49 (1995) (noting that "in *Colorado River*, the Court was only concerned about judicial economy. In *National Farmers* and *Iowa Mutual*, however, the Court was also concerned about promoting tribal self-government by preserving the tribal court's authority over reservation affairs.").[10]

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[10] It is true, as Bank One notes, that the court in *Vance v. Boyd Mississippi*,

In a further effort to persuade this court to maintain this case in federal court, Bank One submits that this case is analogous to *F.G.S. Constructors, Inc. v. Carlow*, 64 F.3d 1230 (8th Cir. 1995), in which the court found that the tribal exhaustion doctrine was not applicable because the parties' agreement contained a forum selection clause by which they had agreed that

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Inc., 923 F. Supp. 905 (S.D. Miss. 1996), did hold that *Colorado River* applied in the context of tribal exhaustion; but that decision, which has been criticized by a number of commentators, *see* Royster, Judith V., *Statute and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 262-63 (1998); Koehn, Melissa L., *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 768 n.164 (1997), is not binding on the undersigned.

In any event, even were the court to take into account the *Colorado River* factors in determining whether it should "stay its hand" while the tribal court considers its jurisdiction, the court would resolve the issue in favor of abstention, for while the court is fully cognizant of the strong federal policy favoring arbitration to which Bank One repeatedly refers, the court is also well aware of the strong federal policy of encouraging tribal self-government and fostering the relationship of comity between the federal and tribal courts. Thus, while the court understands that "the desirability of avoiding piecemeal litigation" is typically not a factor that counsels in favor of *Colorado River* abstention in a case brought to compel arbitration under the FAA because of the federal policy favoring arbitration, *see Safety Nat'l Cas. Corp. v. Bristol-Myers Squibb Co.*, 214 F.3d 562, 565-66 (5th Cir. 2000) ("the 'piecemeal litigation' factor is not applicable in the FAA context, where the overriding federal policy is 'to give effect to . . . arbitration agreements'.") (quoting *Moses H. Cone*, 460 U.S. at 20, 103 S. Ct. 927), in a case which also involves a challenge to a tribal court's jurisdiction, the competing federal policy favoring tribal self-government must be given consideration. And this court is of the view that in such a case, it is this latter policy which must prevail. *Cf. United States v. Tsosie*, 849 F. Supp. 768, 771 (D.N.M. 1994) (noting that "[our] Supreme Court has been clear that jurisdictional issues should be determined, in the first instance, in tribal court," concluding "that the *National Farmers* comity considerations outweighed the short-term considerations of [the] parties" and observing that it makes no sense and would be grossly inefficient to try this case in [federal district court], only to find on a potential appeal, that the case should have been remanded to tribal court. I prefer to have this case proceed on the track and in the chronological order prescribed by our Supreme Court.")

any dispute could be heard in either tribal court or federal district court. The court was of the view that "there was no significant comity reason to defer . . . [the] litigation first to the tribal court" since the Tribe, by the forum selection clause, had agreed that disputes need not be litigated in tribal court. *Id.* at 1233. Bank One reasons that in this case, the parties' arbitration agreement operates as a forum selection clause, since it expressly incorporates the FAA, and since § 4 of the FAA permits suits to compel arbitration to be brought in federal district court. The court, however, is not only dubious of the conclusion that the existence of a forum-selection clause obviates tribal exhaustion,[11]

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[11] As one court has noted,

> There is a difference of opinion . . . as to whether contractual forum-selection clauses escape application of the [tribal exhaustion] doctrine. *Compare Basil Cook*, 117 F.3d at 63-64, 69 (affirming application of tribal exhaustion doctrine despite the presence of an arbitration clause in the contract sub judice), and [*Snowbird Const. Co. v. United States*, 666 F. Supp. 1437, 1444 (D. Idaho 1987)] (holding that the initial interpretation of a contractual forum-selection clause must be made by the tribal court) with [*Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814-15 (7th Cir. 1993)] (deciding that the tribal exhaustion doctrine did not apply to a forum-selection clause in a contract between a non-Indian corporation and an Indian manufacturing company).

Ninigret Dev. Corp., 207 F.3d at 33. That court concluded that although the question was close, it believed that under *National Farmers*, "the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract," *id.*, reasoning as follows:

> At that stage, the pivotal question is not which court the parties agreed would have jurisdiction, but which court should, in the first instance, consider the scope of the tribal court's jurisdiction and interpret the pertinent contractual clauses (including any forum-selection proviso). *See Iowa Mut.*, 480 U.S. at 16, 107 S. Ct. 971; *National Farmers*, 471 U.S. at 855-57, 105 S. Ct. 2447. This

but is wholly unpersuaded that the subject arbitration provision may fairly be said to constitute a choice by defendant of this court as a forum for any litigation.

For the foregoing reasons, the court concludes that the tribal exhaustion doctrine applies in this case. The question then becomes whether the court should stay or dismiss the case. "In applying the tribal exhaustion rule, district courts have discretion to decide whether to stay or to dismiss the federal action." *Potaluck Corp. of Kansas v. Prairie Band of Potawatomi Indians*, 2000 U.S. Dist. LEXIS 20846, No. Civ. A. 99-2051-GTV, 2000 WL 1721797, at *3 (D. Kan. Aug. 23, 2000) (citing *National Farmers*, 471 U.S. at 857, and *Iowa Mutual*, 480 U.S. at 20 n.14). The court in *Potaluck* decided to dismiss that case without prejudice "because no claims had been brought to which the tribal exhaustion rule should not be applied, the case [was] still in the early stages of litigation, and dismissal without prejudice [would] allow Plaintiff to return to federal court once it has exhausted its tribal court remedies." *Id.*; *see also Navajo*

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logic indicates that where, as here, the tribal exhaustion doctrine applies generally to a controversy, an argument that a contractual forum-selection clause either dictates or precludes a tribal forum should not be singled out for special treatment, but should initially be directed to the tribal court. *See Basil Cook*, 117 F.3d at 63-64, 69; *Snowbird*, 666 F. Supp. at 1444.

We also believe that this approach comports with the concern for tribal sovereignty that forms the epicenter of the tribal exhaustion doctrine. *See El Paso Natural Gas*, 526 U.S. at 483, 119 S. Ct. at 1437; *National Farmers*, 471 U.S. at 856, 105 S. Ct. 2447. For the district court to bypass the tribal court and interpret the forum-selection clause itself would place the two judicial systems in direct competition with each other, and thereby undermine the tribal court's authority over tribal affairs. Proper respect for tribal legal institutions counsels convincingly against putting courts on such a collision course. *See Iowa Mut.*, 480 U.S. at 16, 107 S. Ct. 971.

Id.

Nation v. Intermountain Steel Bldgs., Inc., 42 F. Supp. 2d 1222, 1230-31 (D.N.M. 1999) (recognizing district court's discretion "to either dismiss without prejudice or to stay federal court proceedings when exhaustion of tribal court remedies is required," and concluding that it was appropriate to dismiss the action without prejudice "to allow the parties to proceed expeditiously in the courts of the Navajo Nation"); *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 512 (D.N.M. 1994) (finding "no reason to retain jurisdiction at this point and . . . dismissing [the] case without prejudice"); *cf. Calumet Gaming Group-Kansas*, 987 F. Supp. at 1330 (observing that in the Tenth Circuit, "[a] stay is preferred because if the proceedings in the other court 'do not resolve all the federal claims, a stay preserves an available federal forum in which to litigate the remaining claims, without the plaintiff having to file a new federal action,'" and finding that since the plaintiff had requested a stay and the Tribe had not offered any reason why the court should dismiss the action instead, the case would be stayed pending the plaintiff's exhaustion of tribal remedies).

The court in this case, in the exercise of its discretion, will dismiss this case, as requested by defendant, as the court perceives no particular benefit in staying rather than dismissing the case.[12] Accordingly, it is ordered that defendant's motion to

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[12] This is so even though the court recognizes that the case may ultimately return to federal court. As the court in *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d at 35, explained,

> Since the concern for exhaustion arises out of comity considerations rather than jurisdictional constraints, remitting the case to the tribal court does not preclude the possibility of review by the federal court at a future date. *See Iowa Mut.*, 480 U.S. at 19, 107 S. Ct. 971; *Brown v. Washoe Hous. Auth.*, 835 F.2d 1327, 1329 (10th Cir. 1988). Should the case return to the federal court, all preserved jurisdictional issues (including those related to the tribal court's handling of the forum-selection clause) are subject to plenary district

dismiss is granted.

SO ORDERED this 20th day of February, 2001.

Tom S. Lee

UNITED STATES DISTRICT JUDGE

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court review. *See Iowa Mut.*, 480 U.S. at 19, 107 S. Ct. 971. Nevertheless, as long as the tribal court has properly defined its own jurisdiction, respect for the tribal court system will bar the relitigation of merits-related issues that were presented to and decided by that court. *See id.*; *see also* David H. Getches et al., FEDERAL INDIAN LAW 528 (4th ed. 1998) ("The federal court should not be tempted beyond the jurisdictional question, even by a tribal court's decision on the merits that it finds questionable.").

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

Consolidated Cases Nos. 01-60228, 01-60229, 01-60230, 01-60231, 01-60232, 01-60233, 01-60234, 01-60235, 01-60236, 01-60237, 01-60238

March 28, 2002

BANK ONE, N.A.,

PLAINTIFF-APPELLANT,

VERSUS

MYRA MAE SHUMAKE, DARLENE VAUGHN, ANDIA WILLIAMSON, KARREN SAM, VIRGINIA WILLIS, WILLIE WILLIS, LAVERN WILLIS, BRAINARD LEWIS, A/K/A BRIANARD LEWIS, ROBIN WILLIS, DANITA WILLIS; KIRBY WILLIS, DINA THOMAS AND ROSE WILLIS,

DEFENDANTS-APPELLEES.

Appeals from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 2/15/02, 5 Cir. ____, ____ F.3d ____)

Before KING, Chief Judge, and DAVIS and MAGILL,* Circuit

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* Circuit Judge, U.S. Court of Appeals for the Eighth Circuit, sitting by

Judges.

PER CURIAM:

(X) The Petition for rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

W. Eugene Davis

United States Circuit Judge

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designation.

APPENDIX D

Section 2 of the FAA, 9 U.S.C. § 2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA, 9 U.S.C. § 3

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the FAA, 9 U.S.C. § 4

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance

with the terms thereof.

Section 16 of the FAA, 9 U.S.C. § 16

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(2)

Supreme Court, U.S.
FILED
JUL 25 2002
OFFICE OF THE CLERK

No. 01-1732

In the
Supreme Court of the United States

BANK ONE, N.A.,
Petitioner,

v.

MYRA MAE SHUMAKE, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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4/4/89

QUESTIONS PRESENTED

1. Does the Federal Arbitration Act, 9 U.S.C. § 4, bar a U.S. district court from ordering exhaustion of tribal remedies on the tribal law question whether there exist valid agreements to arbitrate claims pending against a bank in a tribal court arising from commercial contracts with tribal members solicited on reservation trust lands by the bank's door-to-door salesman?

2. Does a tribal court have jurisdiction in suits filed against a bank to decide the tribal law question whether there exist valid agreements to arbitrate disputes arising from commercial contracts with tribal members solicited on reservation trust lands by the bank's door-to-door salesman, to compel arbitration if such agreements are found, and, if not found, to adjudicate those disputes?

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Ninigret Development Co. v. Narrangansett Indian Wetuomuck Housing Authority, 207 F.3d 21 (1st Cir. 2000) 21

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Stock West, Inc. v. Confed. Tribes of the Colville Reservation, 873 F.2d 1221 (9th Cir. 1989) 22

Strate v. A-1 Contractors, Inc., 520 U.S. 438 (1997) . . . . . *passim*

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The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 281 F.3d 507. The opinion of the district court (Pet. App. 15a-35a) is reported at 144 F.Supp.2d 640.

JURISDICTION

The court of appeals issued its decision on Feb. 15, 2002. Bank One, N.A.'s ("Bank One's") timely petitions for rehearing and rehearing *en banc* were denied on Mar. 28, 2002. (Pet. App. 36a). No member of the panel nor any judge in regular active service on the court of appeals requested that the court be polled on the petition for rehearing *en banc*. (Pet. App. 37a). This Court's jurisdiction was invoked by Bank One pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Background and Proceedings in the Tribal Court and the District Court. The Mississippi Band of Choctaw Indians (the "Tribe") is a federally recognized Indian tribe located on Choctaw Indian Reservation trust lands in Mississippi (the "Reservation"). Respondents (all Choctaw Tribal members) filed suit against Petitioner ("Bank One") in the civil division of the Tribe's courts (the "Choctaw court"). Respondents seek rescission and damages based on certain home satellite system sales and financing contracts solicited by Bank One through a door-to-door salesman at Respondents' homes on the Reservation. Respondents allege that the sales and financing contracts were induced through the salesman's false and fraudulent representations. (Pet. App. 15a-16a). Those lawsuits are still pending. It is undisputed that there were no arbitration provisions in those original contracts. (Pet. 4-5).

Bank One claims it later sent a "mailer" to Respondents proposing to add an arbitration clause to the

financing contracts and giving Respondents a thirty day window to reject this change. (Pet. 4-5). Bank One has not proven the due receipt of any of these mailers, and there has been no judicial determination of whether this procedure was legally sufficient to give rise to an agreement to arbitrate valid under the Tribe's choice of law rules and contract law.

After these lawsuits were filed, Bank One filed suits to compel arbitration in the federal district court under § 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, claiming the parties had agreed to binding arbitration. The jurisdiction of the district court was based solely on 28 U.S.C. § 1332, Bank One being an Ohio Corporation and the Respondents being reservation residents, but citizens of Mississippi for diversity purposes. (Pet. App. 28a).

Bank One did not attack the Choctaw court's civil jurisdiction over Respondents suits, but did ask the district court to bar exercise of that jurisdiction. In response, Respondents filed a motion to dismiss for Bank One's failure to exhaust tribal remedies. In that motion and in response to Bank One's motion to compel arbitration, Respondents timely called to the attention of the district court that the validity of the alleged arbitration agreements was in dispute and that this was an issue controlled by Choctaw law. The district court dismissed Bank One's suits, ruling that exhaustion of tribal remedies was required "so that the parties may present their positions for consideration by the tribal court." (Pet. App. 16a).

The district court ordered exhaustion (a) because Respondents had made "the requisite colorable claim of tribal jurisdiction" necessary to invoke the tribal exhaustion doctrine "since the activities of which [Respondent] complains not only occurred on [reservation trust lands], but also involve the formation of [commercial contracts] between Bank

One and a member of the Tribe." (Pet. App. 21a-22a), and Bank One's federal lawsuits involved a challenge to exercise of the Choctaw court's jurisdiction; (b) because Bank One did not claim that any of the exceptions to tribal exhaustion under *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) were applicable (Pet. App. 24a); and (c) because the FAA is not the kind of statute which preempts the tribal exhaustion doctrine. (Pet. App. 26a-28a).

Bank One has always had the right to present its arbitration arguments to the Choctaw court, but has not done so. Respondents have acknowledged the Choctaw court's duty to compel arbitration if valid arbitration agreements are found to exist.

2. Proceedings in the Fifth Circuit. The court identified the controlling question on appeal to be "[d]oes the FAA have the pre-emptive force of the Price-Anderson Act thereby displacing comity considerations underlying the tribal exhaustion doctrine?" The court ruled that the FAA "does not reflect a congressional intent for federal courts to occupy the entire field of arbitration law", and does not reflect a Congressional preference that Bank One's arbitration claims should or must be resolved in a federal forum; hence, held the FAA does not have the preemptive force of the Price Anderson Act ("PAA"), 42 U.S.C. §§ 2014(hh) and 2201 *et seq.*, found in *El Paso Natural Gas Company vs. Neztsosie*, 526 U.S. 473 (1999) to excuse exhaustion of tribal remedies. Accordingly, exhaustion was required. (Pet. 8a-11a).

Bank One's statement (Pet. 1) that "[t]he Fifth Circuit nevertheless held that, when there is an action pending in Indian tribal court, a federal district court *may not* adjudicate a motion to compel arbitration under the FAA, even though a party has breached a "legally enforceable arbitration agreement" is an inaccurate characterization of the Fifth

Circuit's ruling. The question whether a valid written agreement to arbitrate exists in this case – a question of tribal law, not federal law – has not yet been answered. Thus, it is a gross inaccuracy to suggest that the Fifth Circuit's ruling required dismissal for failure to exhaust tribal remedies in the face of a § 4 motion to compel arbitration in a case where all parties have acknowledged (or it has already been judicially determined between the parties) that there exists an arbitration agreement valid under local law and "legally enforceable" under the FAA. It may well be that in such circumstances, exhaustion would "serve no purpose other than delay," and would not be required. *See, Strate v. A-1 Contractors*, 520 U.S. 454, 459-460, n.14 (1997); but, this case does not involve those circumstances.

Likewise, Bank One's assertions (Pet. 7-9, 20-21) that the Fifth Circuit ruling in this case is inconsistent with the Fifth Circuit's own arbitration rulings in other appeals upholding Bank One's "mailer" procedure and that those other rulings "resolve" the arbitration issues presented here, making "this case an ideal vehicle" for addressing the FAA issues raised in Bank One's first "Question", are clearly wrong. The question answered in those *unpublished* decisions – whether Bank One's mailer gave rise to a written agreement to arbitrate which was otherwise enforceable under the applicable local law (including the original contract's choice of law specification of Ohio law) – did not turn on federal law. Instead, that question is controlled by the non-federal contract law of the different jurisdictions into which Bank One's "mailer" was allegedly sent. Choctaw law had no bearing upon and was not applied in those cases and none of those unpublished decisions are precedent under the rules of the Fifth Circuit, hence did not judicially resolve anything. *See, infra,* part 2.C.

Further, neither lower court ruled upon the jurisdictional issue which underlies Bank One's second "Question" – whether the Choctaw court has jurisdiction to adjudicate Respondents' civil claims against Bank One. Instead, the Fifth Circuit merely affirmed the district court's decision that Respondents had made the "requisite colorable claim of tribal jurisdiction" required to invoke the tribal exhaustion doctrine. (Pet. App. 2a, 21a) This left for another day any final determination on whether the Choctaw court has civil jurisdiction over these suits against Bank One on the facts of this case under *Montana v. U.S.*, 450 U.S. 544 (1981) after a full record on this issue is developed in the Choctaw court (Pet. App. 34a-35a).

REASONS FOR DENYING THE WRIT

1. Introduction to Reasons for Denying the Writ.

The question whether Bank One's later "mailer" was sufficient to add an arbitration clause to the parties' contracts is the controlling issue in this case. The FAA leaves that contract issue to be decided by the non-federal contract law of the jurisdiction in which the arbitration agreement is claimed to have arisen. In this case, that jurisdiction is the Choctaw Indian Reservation and Choctaw law (including the Tribe's choice of law rules) supplies the rules of decision missing from the FAA. *See, infra,* parts 2.B. and C. Hence, Bank One's assertions (Pet. 19) that "there were no practical reasons for requiring tribal exhaustion" since this case only involves "federal law – the FAA – not tribal law" and that no "tribal court proceeding [was] needed to develop an evidentiary record", are completely at odds with the facts of this case and the law of arbitration under the FAA.

Seeking to evade its duty to exhaust tribal remedies, Bank One has throughout these proceedings sought to induce the courts to ignore the controlling tribal law questions – to

skip them – to jump directly to its asserted federal right to secure enforcement of what it claims to be binding written arbitration agreements. The Fifth Circuit decision properly protected the right of the Choctaw parties – derivative of the Mississippi Choctaws' "right to make their own laws and be ruled by them" under *Williams v. Lee*, 358 U.S. 217 (1959) – to secure an answer to these local law questions in the Choctaw court under Choctaw law before being forced to give up their right to a judicial determination of their disputes with Bank One.

On Bank One's first "Question," the Fifth Circuit's disposition of these FAA/tribal exhaustion issues is not in conflict with any decision of this Court or with any decision of any other federal circuit. *Every other federal circuit to address these issues has come out the same way. See, infra,* part 2.D. This is because federal statutes such as the FAA which merely offer the option of using a federal forum for resolving certain private disputes, but leave to the plaintiff the choice of pursuing those claims in a non-federal forum; or, to a defendant the option to have such a claim when filed in a non-federal forum resolved there, do not excuse compliance with the tribal exhaustion doctrine. It is only when the federal statute at issue either requires – or makes unmistakably clear that the Congress prefers (not merely permits) – resolution of those private disputes in a federal forum, that the duty to exhaust tribal remedies is waived. *Neztsosie*, 526 U.S. at 484, n.6 and 485, n.7. *See, infra,* parts 2.A. and B.

Nor does the Fifth Circuit's decision to leave the jurisdictional issues underlying Bank One's second "Question" for later determination after exhaustion of tribal remedies conflict with any decision of this Court or any other federal circuit. Bank One did not challenge on appeal the district court's ruling that none of the exceptions to tribal exhaustion established in *National Farmers* were applicable

(Pet. App. 24a); and, Bank One did not attack in the district court the underlying civil jurisdiction of the Choctaw court to adjudicate the pending tribal court cases and again disclaimed any such attack "in this appeal" in its reply brief before the Fifth Circuit. *See, infra,* parts 3.A. and B. Instead, Bank One's sole argument for evading exhaustion of tribal remedies was its claim that the FAA preempted the tribal exhaustion doctrine. (Pet. App. 21a-23a). That claim was properly rejected by the Fifth Circuit on the facts of this case. *See, infra*, parts 2.D and 3.D. and E.

Bank One's new argument that it did not know (and had no way to know) it was dealing with reservation Indians (Pet. 25) was not timely raised, first appearing in Bank One's petitions for rehearing in the Fifth Circuit long after oral argument. *See, Comsat Corp. v. FCC*, 250 F.3d 931, 936, n.5 (5th Cir. 2001) (arguments first made at oral argument are not timely raised and will not be considered), and was not ruled upon by either lower court. Had this argument been timely raised, there was ample evidence to refute it. *See, infra,* part 3.C.

Since the Choctaw courts have not been given an opportunity to rule upon any of these jurisdictional questions, since neither lower court ruled upon them and since – in the absence of any challenge to the tribal court's jurisdiction in the district court – the record on this issue is wholly undeveloped, this case is not a proper vehicle for addressing the jurisdictional issues Bank One has now sought to raise in its second "Question." *See, infra,* part 3.

2. The Fifth Circuit's Tribal Exhaustion/FAA Ruling Does Not Conflict With the Rulings of This Court or Any Other Federal Circuit.

A. The Fifth Circuit Correctly Adhered to the Exhaustion Rulings of this Court.

This Court in *El Paso Natural Gas Company vs. Neztsosie*, 526 U.S. at 484, summarized the rationale underlying the tribal exhaustion doctrine as established in *National Farmers Union, supra,* and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) as follows:

> Exhaustion was appropriate in each of those cases because "Congress is committed to a policy of supporting tribal self-government. . .. [which] favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."

In *Strate v. A-1 Contractors, Inc.*, 520 U.S. at 448-453, this Court also reaffirmed the basic exhaustion principles of *National Farmer's Union*[1] *and Iowa Mutual,* but clarified that the ultimate tribal jurisdiction questions are to be resolved under *Montana v. United States*, 450 U.S. 544 (1981), and ruled that exhaustion of tribal remedies is excused if the tribe has no jurisdiction over the underlying claim under *Montana*. *Strate, supra,* at 453-460[2].

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[1] This Court in *National Farmers Union, supra,* at 856, n.21, identified three exceptions to the tribal exhaustion requirement. The district court noted these exceptions but, found that "Bank One had not contended that any of the three *National Farmers* exceptions apply. . . ." (Pet. App. 23a). Bank One did not challenge that ruling on appeal.

[2] *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), later applied the *Strate* exception to invalidate the tribe's attempt to tax the non-member for its conduct on its own fee lands, an action foreclosed by *Montana's* Main Rule, and the inapplicability of either *Montana* exception. The court again emphasized that the tax could have been upheld had it been levied upon the non-Indian company for its conduct on tribally-owned reservation lands, *Id.* at

This Court in *Neztsosie* distinguished for exhaustion purposes between cases filed in tribal courts which involve ordinary questions of federal law (as to which exhaustion of tribal remedies is not excused unless it is clear the tribe otherwise lacks jurisdiction over the action under *Montana* or where one of the other *National Farmers* exceptions to exhaustion is invoked), versus cases filed in tribal courts involving claims which fall within the exclusive jurisdiction of the federal courts based upon a completely preemptive statute,[3] or a statute which otherwise evidences the kind of "*unmistakable*" *Congressional preference* that the dispute should be resolved in a federal forum as was found by this Court in the Price Anderson Act ("PAA"), 42 U.S.C. §§ 2014(hh) and 2201 *et seq.*; *Neztsosie, supra,* at 484, n.6 and 485, n.7:

> 6. This structure [of the PAA], in which a public liability action becomes a federal action, but one decided under substantive state law rules of decision that do not conflict with the Price-Anderson Act, *see* 42 U.S.C. § 2014(hh), resembles what we have spoken of as "'complete pre-emption' doctrine," *see Caterpillar Inc. v.* Williams, 482 U.S. 386,

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651-654, or pursuant to a "consensual relationship evidenced by "commercial dealing, contracts, leases or other arrangements". *Id.* at 655-656.

[3] In this regard, *see,* Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty,* 50 Am. U.L. Rev. 1177, 1241 (2001) (in *Neztsosie* "Justice Souter was careful to point out, however, that only in cases involving complete preemption such as those brought under the [PAA], can defendants correctly assert that they need not exhaust their tribal remedies").

393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), under which "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule,'". (Citations omitted).

* * * *

7. This is not to say that the existence of a federal preemption defense in the more usual sense would affect the logic of tribal exhaustion. Under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think that questions of federal preemption are any different. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (tribal courts available to vindicate federal rights). The situation here is the rare one in which statutory provisions for conversion of state claims to federal ones and removal to federal courts express congressional preference for a federal forum.

In *Neztsosie*, this Court ruled that the PAA evidences an unmistakable Congressional preference that a federal forum decide public liability actions derivative of "nuclear incidents" in several ways. Initially, 42 U.S.C. §§ 2014(hh) and 2210(n)(2) federalize all such tort claims and authorize the promulgation of special rules by which the federal courts are to handle those claims (§ 2210(n)(3)(C)(v)), giving rise to a complete preemption of the field as to all such claims. *Neztsosie, supra,* at 484-485 and 484, n.6; *see, Acuna v.*

Brown & Root, Inc., 200 F.3d 335 (5th Cir. 2000) (the PAA creates "an exclusive federal cause of action for torts arising out of nuclear incidents."

Moreover, § 2210(n)(2) (Resp. App. 1a) contains a unique removal provision which *inter alia* gives the Atomic Energy Commission (now known as the Nuclear Regulatory Commission) and the Secretary of Energy (or either of them), and any defendant, the right to remove or transfer any such "public liability" action pending in any state court, or in any other U.S. district court, "to the U.S. District Court having venue" over such actions as otherwise provided at § 2210(n)(2). By this extraordinary provision, allowing either the Commission or the Secretary to force removal of the action (though not parties to the suit), Congress took this choice-of-forum decision from the parties and made unmistakably clear its preference that these cases be decided in the federal forum designated in the PAA.

Bank One asks this Court to summarily reverse or GVR this case because the Fifth Circuit described *Neztsosie* as "the most recent Supreme Court case" to address the tribal exhaustion doctrine. (Pet. 7, 12) and did not cite *Nevada v. Hicks*, 121 S.Ct. 2304 (2001). Bank One's criticism is unfounded. *Nevada v. Hicks, supra,* at 2315 did briefly allude to the tribal exhaustion doctrine and applied the same exception to exhaustion recognized in *Strate v. A-1 Contractors, supra* – excusing exhaustion where the court found that there was no tribal jurisdiction over the underlying action. Exhaustion was excused in *Hicks* because of the ruling that tribes do not possess any jurisdiction over state officials as regards their official conduct, nor (derivatively) any jurisdiction to adjudicate 42 U.S.C. § 1983 claims against such officials. *Hicks, supra,* at 2313. On that basis, the Court held that "adherence to the tribal exhaustion requirement in

such cases 'would serve no purpose other than delay,' and is therefore unnecessary." *Hicks, supra*, at 2315.[4]

However, the special circumstance which triggered this exception to exhaustion in *Hicks* does not apply here since no conduct of state officers is involved. *Nevada v. Hicks, supra,* at 2309, n.2 ("Our holding in this case is limited to the question of tribal court jurisdiction over State officers enforcing state law."). This distinction, and Bank One's tortured attempt to shoehorn the FAA into the PAA template marked out in *Neztsosie* makes clear that the Fifth Circuit did not err in observing (Pet. App. 7a) that *Neztsosie* was "the most recent" tribal exhaustion decision of this Court germane to this case.

B. The FAA Does Not Reflect An "Unmistakable" Congressional Preference That a Federal Forum Resolve Arbitration Issues, Nor Is It Otherwise Completely Preemptive.

Unlike the PAA, the FAA does not confer exclusive or even concurrent jurisdiction upon the federal courts, *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S.1, 25, n.32 (1983), allows the parties to contractually circumvent many of its provisions, *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478-479 (1989), and does not require (or reflect any

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[4] To the extent this Court's ruling in *Nevada v. Hicks* that tribal courts do not have jurisdiction to adjudicate claims under 42 U.S.C. 1983 is viewed to be an "exhaustion" rather than a "jurisdictional" ruling, it simply mirrors the special concern otherwise evidenced in *Hicks* that tribal courts not encroach upon the official prerogatives of state officers by subjecting them to 1983 litigation in tribal courts, something this Court ruled the Congress never intended. *Hicks, supra,* at 2315.

Congressional preference) that a party's federal arbitration claims ever be presented to a federal forum. Instead, this choice-of-forum decision is wholly left to the parties under the FAA. The FAA merely creates a federal arbitration enforcement remedy available only if some other basis for federal jurisdiction exists. Indeed, as this Court has recognized the FAA is an "anomaly" and "enforcement of the [FAA] is left in large part to the state courts. . .." *Moses H. Cone, supra,* at 25, n.32; *see, C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 121 S.Ct. 1539 (2001) (affirming Oklahoma court's arbitration ruling re contract dispute with Indian tribe).

Moreover, the FAA neither expects nor requires uniformity in the answer to the question whether a valid arbitration agreement exists, instead leaving this to be determined by the non-federal contract law of the jurisdiction in which the dispute arose, including that jurisdiction's choice of law and unconscionability rules as applied to questions of "contract formation." 9 U.S.C. § 2 (". . .an agreement in writing to submit to arbitration. . .shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); *Doctor's Associates v. Casarotto*, 517 U.S. 681, 687 (1996) (". . .generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (the question whether a valid agreement to arbitrate exists is governed by the non-federal law governing "the formation of contracts"); *see, EEOC v. Waffle House, Inc.*, 122 S.Ct. 754, 761-762 (2002) (FAA requires arbitration only when parties are bound to arbitrate by written agreement valid under applicable contract law); *Coastal Industries, Inc. v. Automatic Steam Products Corp.*, 654 F.2d 375 (5th Cir. 1981) (seller's

attempt to add arbitration provision on back of printed invoice was a material alteration to the contract "to which no assent was given" hence was not valid under the "applicable state law" or enforceable under the FAA); *East Ford, Inc. v. Taylor*, 2002 WL 1584301 (Miss. S.Ct., July 18, 2002) (*en banc*) (arbitration clause held unconscionable, hence invalid and unenforceable under state law and the FAA); *Roberts v. Energy Development Corp.*, 235 F.3d 935, 939 (5th Cir. 2000) (contractual choice of law provision specifying Texas law was unenforceable since accident occurred in Louisiana and applying Texas law would contravene public policy of Louisiana as forum state).

In this regard, the Choctaw Reservation is a different law-making jurisdiction than the State of Mississippi or the State of Ohio. *Nevada v. Hicks*, 121 S.Ct. at 2511; *Williams v. Lee,* 358 U.S. at 220-223 (1959) (holding that absent governing acts of Congress, Indian tribes have "the right to make their own laws and be ruled by them" and to have that law applied to private commercial disputes between tribal members and non-members arising on their reservations); *see, United States v. John,* 437 U.S. 634 (1978) (holding that Choctaw Reservation was lawfully established and Tribe was lawfully recognized as an Indian tribe pursuant to federal law). Thus, in this case, the FAA leaves the underlying choice-of-law and contract issues implicated by this arbitration dispute to be supplied by the local law of the Tribe. *See, Hilti, Inc. v. Oldach*, 392 F.2d 368 (1st Cir. 1968) (applying Puerto Rico choice-of-law rules to determine validity of arbitration clause specifying Connecticut law in action to compel arbitration under FAA); *see also, Res. 2d, Conflicts*, §§ 186, 187 (ALI 1971) (contract choice of law clause does not incorporate choice of law rules of state law chosen, and such clause is not otherwise controlling if it offends public policy of the most interested jurisdiction).

The FAA does reflect a strong federal policy favoring arbitration and has given rise to federal law standards for deciding what issues are arbitrable once a valid arbitration clause is found to exist. *Moses H. Cone, supra*, at 24-25. However, those standards do not come into play until after a valid arbitration agreement is found. *See, EEOC v. Waffle House, Inc., supra,* at 761-762; *Badie v. Bank of America,* 79 Cal. Rptr.2d 273, 280 (Cal. App. 1998) (Bank's attempt to add an arbitration clause by a "mailer" with right to opt out did not create a valid arbitration agreement because Bank's customers had not actually agreed to arbitrate).

Bank One's preemption argument fundamentally rests upon the simple, but spurious, tautology that since Congress authorized Bank One to use "any United States District Court" to resolve its arbitration claims where diversity or federal question jurisdiction exists, the federal courts must set aside the tribal exhaustion requirement and decide those claims. (Pet. 12).

Petitioner's argument overlooks a critical aspect of the tribal exhaustion doctrine – it never applies unless there is already present some basis for the exercise of federal jurisdiction in a "U.S. District Court" to decide the claim presented. This circumstance can always be said to reflect a prior determination of the Congress that a federal forum must be made available *at the election of a plaintiff* for adjudication of *all such claims* by direct filing under § 1331 or § 1332, or at the *election of a defendant* by removal from a state court under § 1441, and that the district court has a clear statutory duty to decide those claims. *Colorado River Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976) (recognizing "virtually unflagging obligation of the federal courts to

exercise the jurisdiction given them" by Congress through enactment of jurisdictional statutes)[5].

But *Neztsosie* makes clear that federal statutes which merely confer this kind of option upon a party to choose whether to present a certain claim to a federal or to a non-federal forum do not preempt the duty to exhaust tribal remedies, *El Paso Natural Gas Company vs. Neztsosie, supra,* at 485, n.7. Exhaustion is excused only where the federal statute involved is completely preemptive, as noted in *Neztsosie, supra,* at 484, n.6; or otherwise evidences the kind of unmistakable Congressional preference that all such claims be resolved in a federal forum as in the PAA. *See, TTEA Corp. v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999) (25 U.S.C. § 81 did not excuse exhaustion of tribal remedies nor divest tribe of jurisdiction of case involving § 81 claim and commercial contracts between Tribe and private parties arising on-reservation since § 81 is not completely preemptive).

Instead, the FAA invites parties to alleged arbitration agreements to choose whether to have a federal or nonfederal forum decide whether a valid arbitration agreement exists, but does not require (or evidence any kind of Congressional

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[5] Of course, this broad brush statement is not literally true. Parties in these circumstances are often deprived of a federal forum in such cases where one of this Courts' other "abstention" doctrines are invoked to leave a case in state court. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *see, Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

preference) that a party must choose a federal forum to answer that question. Thus, § 4 of the FAA does not impose any greater duty upon the district courts to decide disputes as to the validity or enforceability of alleged arbitration agreements, than their duty to decide similar issues arising under other not-completely-preemptive federal statutes or when similar contract issues are confronted in diversity cases; and, yet, it is in precisely such circumstances that the tribal exhaustion doctrine requires that the federal action be stayed or dismissed where necessary to avoid interference with a tribal court's jurisdiction. Thus, the Fifth Circuit properly ruled that the FAA did not preempt the tribal exhaustion doctrine in this case[6]. To like effect, see the decisions of other federal circuits coming to the same conclusion set out *infra,* part 2.D.

C. The Other Unpublished Fifth Circuit Decisions Approving Bank One's "Mailer" Procedure Were Not Rulings of Federal Law or of Choctaw Law and Are Not Precedent.

As shown in *supra* part 2.B., the critical predicate arbitration question affirmatively answered in the several

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[6] As previously noted, Respondents did timely call to the attention of the district court that the validity of the alleged arbitration agreement was in dispute and that that dispute had to be decided under Choctaw law. Instead of ruling on those issues, the district court correctly dismissed for exhaustion of tribal remedies. If it were ultimately found that the district court was the proper forum for resolving these issues of tribal law, Respondents would be entitled to have a hearing before the district court on those tribal law issues and only if Bank One prevailed on them could an order compelling arbitration be entered.

unpublished opinions from the Fifth Circuit cited by Bank One (Pet. 7-9, 20-21) – whether Bank One's mailer gave rise to a written agreement to arbitrate which was otherwise valid under the applicable local law, including the original contracts' choice of law specification of Ohio law – did not turn on federal law; and, since those cases did not arise on the Choctaw Indian Reservation, also did not involve Choctaw law.[7] Moreover, these unpublished Fifth Circuit decisions "are not precedent" under Fifth Circuit Rule 47.5.4 (Rep. App. 2a), hence determine nothing as to Respondents' disputes with Bank One. *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 359, n.3 (5th Cir. 2002). Affirming those decisions is not inconsistent with letting the Choctaw court rule in Respondents' suits on the tribal law question whether there exists a valid arbitration agreement applicable to these contracts.[8]

The later bankruptcy court decision in *Bank One, N.A. v. Chickaway* (*In re Chickaway*)[9], No. 97-10630 EEG (Bankr.

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[7] *Bank One, N.A. v Lake*, 2002 U.S. App. Lexis 7793 (5th Cir. Apr. 5, 2002) (unpublished); *Bank One, N.A. v. Coates*, 125 F.Supp.2d 819 (S.D. Miss. 2001, aff'd without op., 2002 U.S. App. Lexis 7759 (5th Cir. Apr. 5, 2002).

[8] Due Process would not in any event permit the rulings in these decisions – on these mixed questions of fact and law – to be binding on Respondents who were not parties to those actions even if those decisions had been published. *Provident Tradesmans Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968). ("It is a basic principle that a court's judgment will bind only those who are parties to the suit.").

[9] The *Chickaway* case also arose on the Choctaw Reservation and also began as a Choctaw member suit against Bank One in the Choctaw court. The *Chickaway* case was, however, removed to the district court and transferred to the federal bankruptcy court per 28 U.S.C. § 1452, a statute which authorizes removal of cases

S.D. Miss. Feb. 26, 2002), at p. 4, expressly disclaimed any independent analysis on these questions, simply adopting the decision in *Bank One, N.A. v. Coates, supra*, one of the off-reservation cases later affirmed by the Fifth Circuit. (Pet. 7-9, 20-21). *Id.* at p.4. ("The Court concludes that the remaining issues raised by *Chickaway* have been sufficiently dealt with by the District Court decision in *Bank One, N.A. v. Coates*. . .under very similar facts and that it is not necessary for this Court to make an additional analysis on these issues."). The bankruptcy court did not apply Choctaw law, simply borrowing the state law contract analysis applied in *Coates*; and, there has yet to be any evidentiary hearing or judicial determination whether the Choctaw Respondents actually received, noticed, read, understood or assented to the proposed contract changes, or whether Bank One's effort to add the arbitration clauses is otherwise valid under Choctaw law.

Finally, the Fifth Circuit's ruling in *Bank One, N.A. v. Boyd*, 288 F.3d 181 (5th Cir. 2002), reversed the district court's abstention from deciding Bank One's motion to compel arbitration in actions removed from state court, but noted that the parties opposing arbitration "have asserted a number of contract defenses to the arbitration provision" which could be addressed by the district court on remand under the applicable state law.

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involving core proceedings in bankruptcy "from any court". The Court ruled that § 1452 authorized removal from the Choctaw court and that tribal exhaustion was not required (for disputes constituting core proceedings in bankruptcy) because the "bankruptcy court has sole and exclusive jurisdiction" over such cases. *Chickaway v. Bank One Dayton, N.A.*, 261 B.R. 646 (S.D.Miss. 2001).

Thus, Bank One's assertions that this case is an "ideal vehicle" for addressing Bank One's arbitration arguments because it has already been judicially determined that Bank One's attempt to add an arbitration clause to Respondents' contracts gave rise to a valid and "legally enforceable" arbitration clause, are clearly erroneous. (Pet. 1, 7-8, 20-21).

D. The Fifth Circuit's Exhaustion/FAA Ruling is in Complete Accord With The Decisions Of Other Federal Circuits

Bank One has identified a number of cases from other federal circuits which it contends are in conflict with the Fifth Circuit's ruling. (Pet. 18-19). Two of those cases involved federal statutes which confer exclusive subject-matter jurisdiction upon the district courts to decide a particular class of cases. *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097-98 (8th Cir. 1989) (tribal exhaustion not required as to suits filed under 42 U.S.C. § 6972(a) which "places exclusive jurisdiction in federal courts" over such suits); and, *Lower Brule Construction v. Sheesley's Plumbing*, 84 B.R. 638 (D.S.D. 1988) (exhaustion of tribal remedies is not required as to core proceedings in bankruptcy, since those claims fall within exclusive jurisdiction of bankruptcy court). *Accord, Chickaway v. Bank One Dayton, N.A.*, 261 B.R. 646 (S.D.Miss. 2001).

Bank One asserts (Pet. 18) that the Fifth Circuit's ruling is in conflict with these decisions because "[t]he only difference between the FAA and these statutes is the absence of a grant of subject-matter jurisdiction" but contends "that distinction does not make a material difference. *See Neztsosie*, 526 U.S. at 484-85, 487 n.7." Bank One's analysis is flawed. The critical distinction between the FAA and these other statutes is that the latter confer *exclusive* federal jurisdiction upon the district (or bankruptcy) courts, hence are completely

preemptive as to such claims, *Neztsosie, supra*, at 484, n.6, in contrast to the FAA and other federal statutes which simply give rise to "questions of federal law" which this Court in *Neztsosie, supra*, at 485, n.7 made clear would not displace the tribal exhaustion doctrine.

The other cases cited by Bank One excused exhaustion of tribal remedies because no tribal court cases were pending when the federal suits were filed, and because the cases did not involve any issues of "tribal law". *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 83-84 (2d Cir. 2001); *Altheimer & Gray v. Sioux Mtg. Corp.*, 983 F.2d 803, 814 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993); *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899, n.2 (9th Cir. 1991); *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F.Supp. 753, 754-55 (D.N.D.1989). For both reasons – the absence of tribal law issues and tribal court proceedings in the other cases, and the presence of both factors here – the Fifth Circuit's ruling is not in conflict with those decisions. Indeed, that Choctaw law is controlling here is a strong argument for requiring exhaustion. *E.g., Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 06/08/1994); *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 08/09/1996).

The Fifth Circuit's ruling that the FAA (or the alleged existence of an arbitration clause) does not excuse tribal exhaustion is the same answer given by every other federal circuit to address those issues. *Ninigret Development Co. v. Narrangansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 30-35 (1st Cir. 2000) (arbitration clause did not excuse exhaustion of tribal remedies); *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 64-69 (2nd Cir. 1997) (affirming District Court's denial of motion to compel arbitration and order that plaintiff exhaust tribal remedies); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412,

1415, 1421-1422 (8th Cir. 1996) (affirming District Court's order requiring exhaustion of tribal remedies despite arbitration clause and contract language agreeing that arbitration process "is deemed sufficient to exhaust the parties' tribal remedies"); *Stock West, Inc. v. Confed. Tribes of the Colville Reservation,* 873 F.2d 1221, 1224, 1227-1230 (9th Cir. 1989) (affirming District Court's dismissal of motion to compel arbitration under FAA and order requiring exhaustion of tribal remedies); *Calumet Gaming Corporation v. The Kickapoo Tribe of Kansas*, 987 F.Supp. 1321, 1328 (D. Kan. 1997) (FAA does not limit tribal court civil jurisdiction to enforce arbitration clause); *see, Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida,* 999 F.2d 503, 508 (11th Cir. 1993) (noting that when federal court action was stayed for exhaustion of tribal remedies after district court denial of motion to compel arbitration, the tribal court found a binding arbitration agreement and ordered parties to arbitrate); *cf. Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848 (8th Cir. 2001), *cert. denied*, 122 S.Ct. 1909 (2002), an arbitration dispute which came to the Eighth Circuit only after exhaustion of tribal remedies was ordered by the district court. *See*, Civil Docket, No. 96-Cv-202, entry of 4/02/02 ("this action is stayed pending plf's exhaustion of tribal court remedies")

E. The Fifth Circuit's Tribal Exhaustion Ruling does not Improperly Elevate Tribal Sovereignty Over State Sovereignty.

Bank One's argument that the Fifth Circuit's exhaustion ruling has the "anomalous effect of wrongly elevating tribal courts over state courts" (Pet. 14) is also in error. As shown *supra,* part 2.B., the tribal exhaustion doctrine is never invoked except in circumstances where the Congress has already given the plaintiff in a private dispute (or the defendant in such a case when choosing removal under

28 U.S.C. § 1441) the choice of avoiding state court jurisdiction. This is true both for cases filed under 28 U.S.C. §§ 1331 or 1332.

In these circumstances, the states' interests have already been wholly subordinated as regards the private parties' choice of forum. This is even more so where as here jurisdiction is founded on diversity under § 1332. In such cases the only federal interest is to help the plaintiff (or defendant) avoid a state forum. *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945). Thus, adherence to the tribal exhaustion doctrine in such cases is no affront to state sovereignty.

More fundamentally, the tribal exhaustion doctrine is about coordinating the exercise of federal and tribal jurisdiction in cases arising on Indian reservations and colorably falling within tribal jurisdiction, *Strate v. A-1 Contractors,* 520 U.S. at 446-454 (1997), and builds upon considerations of comity unique to the special relationship of the United States to the Indian Tribes. *Id.; National Farmers Union, supra; Iowa Mutual, supra*. Obviously, quite different comity and federalism concerns animate the several abstention doctrines governing the coordination of federal court and state court jurisdiction, *see, supra*, at n.3, and this Court has made clear its recognition that state sovereignty and tribal sovereignty markedly differ in both their origin and their attributes. *Nevada v. Hicks, supra*, at 2312-2313. It is, therefore, quite misleading to single out one strand of the many differences in the status of states and tribes as manifesting an affront to state sovereignty.

That these differences may allow removal of a case from a state court to federal court, under § 1441, when the same case would not be removable from a tribal court if it arose on reservation lands, is not caused by the tribal

exhaustion doctrine, but by the text of § 1441 (only authorizing removal from "state courts"). *Nevada v. Hicks*, 121 S.Ct. at 2315; *Martha Williams-Willis v. Carmel Financial Corp.*, 139 F.Supp.2d 773 (S.D. Miss. 2001) (tribal member satellite system lawsuits against finance company not removable from Choctaw courts under § 1441). Moreover, this situation has been obvious at least since *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. at 22 (Stevens, J., dissenting); and, can be easily cured by the Congress if this circumstance proves distasteful. Simply revising § 1441 to read more like the federal bankruptcy removal statute (28 U.S.C. § 1452, authorizing removal of such cases "from any court") would eliminate the difference of which Petitioner complains.

Further, Bank One does not represent any state interest here. It is simply a private party seeking to evade tribal court jurisdiction in a dispute arising on the Choctaw Reservation. Its espoused desire to protect state sovereignty rings hollow in the face of its Herculean efforts to avoid any state forum in its other satellite financing and arbitration disputes in the Fifth Circuit both by removal under § 1441 and invocation of diversity jurisdiction under § 1332. *Bank One, N.A., v. Lake, supra; Bank One, N.A. v. Boyd, supra, Bank One, N.A. v. Coates, supra.*

Finally, for the reasons set out in its opinion below (Pet. App. 11a-12a), the Fifth Circuit's rejection of Bank One's *Colorado River Water Conservation District* abstention argument was not in conflict with any decision of this Court or of any other federal circuit.

3. Neither Lower Court Ruled Upon Any Tribal Jurisdiction Issue and This Case is Not a Suitable Vehicle For Addressing Such Issues.

A. *Bank One did not Challenge the Choctaw Courts' Underlying Jurisdiction Before the U. S. District Court.*

This case is not a suitable vehicle for addressing whether Indian tribal courts have civil jurisdiction to decide disputes arising from commercial relationships between members and non-members of a tribe on their reservation lands as sought by Petitioner's second "Question," since neither lower court ruled on that question, and Bank One expressly disclaimed in the district court any attack upon the Tribe's underlying civil jurisdiction over the suits filed against Bank One in the Choctaw court. (Pet. App. 21a-22a).

B. *Bank One Further Disclaimed any Challenge to the Choctaw Courts' Jurisdiction before the Fifth Circuit.*

Rather than challenging the district court's ruling that Respondents had "advanced the requisite colorable claim of tribal jurisdiction" necessary for invocation of the tribal exhaustion doctrine, Bank One again disclaimed (Reply Br., p. 22, n.12) any attack "in this appeal" on the Choctaw court's underlying subject-matter jurisdiction over the suits filed there against Bank One:

> Tribal jurisdiction is not the issue in this appeal. Whether the tribal court has subject-matter jurisdiction to hear the cases is immaterial because the disputes are required to be arbitrated under the FAA. Therefore, while preserving its right to contest tribal jurisdiction at the appropriate time in the appropriate forum, Bank One will not address it further here.

Only later, after briefing, did Bank One allude in a Rule 28(j) letter to *dicta* in *Nevada v. Hicks, supra,* addressing the tribal civil jurisdiction issue.

C. Bank One's "We Didn't Know" Jurisdictional Argument Was Not Timely Raised and is Otherwise Unfounded

Bank One argues (Pet. 25-27) that it "had no notice that it would be haled into tribal court as a result of the transactions at issue" and asserts that it had no way to learn it was dealing with reservation Indians since "inquiry about an individual's race is prohibited by federal law. 15 U.S.C. § 1691, *et seq.*" Bank One did not timely raise this argument below, first alluding to the issue in its petitions for rehearing. The Fifth Circuit did not rule upon this argument. Had this argument been timely raised, Respondents would have had an opportunity to submit evidence showing that Bank One's salesman was a local resident of Mississippi intimately familiar with the Choctaw Indian Reservation and the tribal status of Respondents. It would not serve the interest of justice nor the interest of this Court to address this argument in these circumstances.

Moreover, Bank One's argument on this issue (Pet. 25-27) misstates the Fifth Circuit's ruling. Neither lower court ruled on the ultimate issue of tribal jurisdiction over the underlying civil claims against Bank One, but only upheld the district court's ruling that Respondents had made the requisite showing to require exhaustion of tribal remedies. (Pet. App. 6a and n.3). *See, Strate v. A-1 Contractors, Inc.,* 520 U.S. 438, 448-454 (1997), where this Court made clear that *Iowa Mutual's* recognition of a presumption of tribal jurisdiction sufficient to trigger tribal exhaustion was not a final ruling on whether the tribe had that jurisdiction. The district court also noted that the ultimate question whether the Choctaw courts

could exercise civil jurisdiction over Bank One will be subject to further federal review after the Choctaw courts have ruled upon that issue. (Pet. App. 32a).

Further, that ruling was not (as Bank One suggests) based on "the mere fact that a non-member of the Tribe has allegedly entered into a commercial relationship with a tribal member," (Pet. 25), but because Bank One's contracts with Respondents were solicited by its salesman in the Tribe's jurisdiction on Choctaw Reservation trust lands. (Pet. App. 21a).

Finally, while Respondents' membership in the Tribe is to some extend based upon their Native American ancestry, *U.S. v. John,* 437 U.S. at 646-647, their legal status as tribal members is a "political" status not a "racial" designation. *Morton v. Mancari*, 417 U.S. 535, 553-555 (1974); and, nothing in 15 U.S.C. § 1691 *et seq.* forecloses inquiry into a credit applicant's tribal membership or whether their residence is located on an Indian Reservation, as argued by Petitioner (Pet. 25).

The regulations implementing § 1691, 12 C.F.R., part 202 – Equal Credit Opportunity (Regulation B), at Sec. 202.5(b) and (d)(5), expressly authorize a lender to inquire "about an applicant's permanent residence," and nothing in § 1691 or Regulation B forbids a lender's inquiry to discern in what jurisdiction its prospective customer resides. Indeed, Bank One was otherwise required to make inquiry whether its salesman would be peddling the subject satellite system/financing package to reservation Indians and to obtain the required Indian trader's permit to avoid running afoul of federal statutes prohibiting the very kind of sales to reservation Indians as occurred here. *See,* 25 U.S.C. §§ 260-264 *et seq.* (the Federal Indian Trader's Statutes) and 25 C.F.R., Part 140, *construed in Central Machinery Co. v.*

Arizona State Tax Commission, 448 U.S. 160, 165 (1980), where this Court held that "one of the fundamental purposes of [the Indian Trader's] Statutes and regulations [is] to protect reservation Indians from becoming victims of fraud in dealing with persons selling goods," and applies even where the seller does not have "a permanent place of business" on the Reservation.

D. *The Fifth Circuit's Ruling is Not in Conflict With Any of the Other Federal Circuit Decisions Cited by Bank One.*

The Fifth Circuit's ruling does not conflict with any of the other federal circuit decisions cited by Bank One (Pet. 24), all of which are obviously distinguishable. *Boxx v. Warrior*, 265 F.3d 771 (9th Cir. 2001), *cert. denied*, 202 U.S. Lexis 3056 (U.S. Apr. 29, 2002) (tribal court did not have civil jurisdiction to adjudicate tort claims filed by tribal members against non-Indians occurring on a federal road right-of-way as to which the Tribe had not expressly reserved its jurisdiction and where neither exception to *Montana's* Main Rule was invoked); *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 260 F.3d 971 (8th Cir. 2001) (limited the kind of contracts to which 25 U.S.C. § 81 applies in a case in which the United States was a party without ruling on any issue of tribal civil jurisdiction or the tribal exhaustion doctrine); *Hornell Brewing Company v. Seth Big Crow*, 133 F.3d 1087 (8th Cir. 1998) (tribal court lacked jurisdiction over tort claims filed against a non-Indian brewery for use of "Crazy Horse" name on an alcoholic beverage where the brewery's offending conduct all occurred off-Reservation); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (tribal court lacked jurisdiction over a tort suit by a tribal member arising from a traffic accident with a non-Indian on a U.S. highway within an Indian reservation where neither *Montana* exception applied).

E. Nothing in Nevada v. Hicks Altered the Tribal Court Civil Jurisdictional Rules Applicable in the Circumstances of this Case

This Court expressly limited its jurisdictional rulings in *Nevada v. Hicks*, 121 S.Ct. 2304 (2001) to circumstances in which Indian tribal courts attempt to exercise civil jurisdiction over state officials sued for their official conduct:

> "Our holding in this case is limited to the question of tribal court jurisdiction over State officers enforcing state law." *Nevada v. Hicks, supra*, at 2309, n.2.

Indeed, this Court reiterated the tribal court jurisdictional principles established under "the path-marking case" of *Montana v. United States*, 450 U.S. 544 (1981) again noting the higher standards previously required to allow the exercise of tribal court civil jurisdiction over non-Indians under *Montana's* Main Rule – applicable where the transaction in question occurred on non-Indian owned fee lands within an Indian Reservation boundary. *Id.* at 2309 and n.2 and 2310 and n.3. The Court also reiterated that the kind of consensual, contractual relationship necessary to invoke tribal civil jurisdiction over a non-Indian party for his conduct on non-Indian fee lands (or its equivalent)[10] under the

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[10] Even if this Court were to also require satisfaction of one of *Montana's* exceptions to sustain tribal court civil jurisdiction over a non-member private party sued by tribal members when the tribal court case arises from the non-member's conduct on reservation trust lands -- rather than on non-member owned fee lands -- that requirement would be satisfied in this case under *Montana's* consensual, commercial contract exception. *See, Hicks, supra,* at 2310, 2316 and 2318-2324 (Souter, J., concurring).

consensual relationship exception to *Montana's* Main Rule, are private commercial contracts with tribal members or a tribal entity. *Hicks*, at 2316-2317.

Thus, the Fifth Circuit's ruling is not in conflict with *Nevada v. Hicks*, *supra*, on the facts of this case.

CONCLUSION

We therefore respectfully request that the Court deny the Petition for Writ of Certiorari and the alternative summary or GVR relief sought by Bank One.

Respectfully submitted,

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APPENDIX A

FIFTH CIRCUIT RULE 47.5.4

47.5.4 Unpublished Opinions Issued on or After January 1, 1996.* Unpublished opinions issued on or after January 1, 1996*, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document. The first page of each unpublished opinion bears the following legend:

Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

APPENDIX B

42 U.S.C. § 2210(n)(2)

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable shall be filed within the period provided in section 1446 of Title 28, or within the 30-day period beginning on August 20, 1988, whichever occurs later.

Supreme Court U.S.
FILED
AUG 2 2002
OFFICE OF THE CLERK

No. 01-1732

IN THE

Supreme Court of the United States

BANK ONE, N.A.,

Petitioner,

v.

MYRA MAE SHUMAKE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondents' asserted immunity from the FAA has no basis in law.

Bank One's petition for writ of certiorari demonstrated that the Fifth Circuit's decision below merits this Court's plenary review because it erroneously expands the prudential, judge-made "tribal exhaustion" doctrine to displace the statutory command of the Federal Arbitration Act (FAA), 9 U.S.C. § 4. Respondents' Brief in Opposition only confirms the need for certiorari. Respondents do not deny that some fifty-two (52) federal district court decisions, applying the FAA to the same satellite dish transactions at issue in this case, have compelled arbitration under the very same arbitration provision. Thirty-three (33) of these decisions have already been affirmed by the Fifth Circuit.[1]

Every federal court to have reached the merits of the Bank One arbitration provision has held that it is legally enforceable under the FAA, that it is not procedurally or substantively unconscionable, and that there are no factual issues warranting discovery. These cases include *Bank One, N.A. v. Chickaway (In re Chickaway)*, No. 97-10630 EEG (Bankr. S.D. Miss. Feb. 26, 2002), in which a federal bankruptcy court has compelled arbitration under the FAA in a case involving Bank One and a member of the Choctaw tribe.

Respondents' principal argument is that the tribal exhaustion

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[1] *See, e.g., Bank One, N.A. v. Coates* 125 F. Supp.2d 819 (S.D. Miss. 2001), *aff'd without opinion*, No. 01-60059 (5th Cir. Apr. 5, 2002); *Bank One, N.A. v. Lake*, 5:00CV227BN (S.D. Miss. Jan. 5, 2001), *aff'd*, No. 01-60051 (5th Cir. Apr. 5, 2002); *Bank One, N.A. v. Quinn*, No. 3:01CV65BN (S.D. Miss. June 6, 2001), *aff'd*, Nos. 01-60543, *et al.* (5th Cir. July 18, 2002); *Bank One, N. A. v. Ashford*, 4:00CV248DB (N.D. Miss. May 21, 2002); *Bank One, N. A. v. Atterbury*, 1:00CV315DA (N.D. Miss. May 15, 2002); *Bank One, N. A. v. Burt*, 1:00CV315DA (N.D. Miss. June4, 2002); *Bank One, N.A. v. George*, 4:01CV18DD (N.D. Miss. May 7, 2002); *Bank One, N.A. v. Hawkins*, 4:01CV17DD (N.D. Miss. May 9, 2002); *Bank One, N.A. v. Taylor*, No. 4:01CV15DD (N.D. Miss. May 6, 2002); *Bank One, N.A. v. Taylor*, No. 2:01CV035DA (N.D. Miss. June 12, 2002); *Bank One, N.A. v. Williams*, No. 3:01CV024DA (N.D. Miss. Apr. 29, 2002).

doctrine should be applied in this case to enable the Choctaw tribal courts to re-decide the validity of the arbitration agreement, which Respondents assert is "an issue controlled by Choctaw law." BIO 2. Respondents insist that they are not subject to the same rules as other Mississippi residents – or even as their fellow tribal member, Ms. Chickaway. Respondents assert that the fifty-two federal judicial decisions "did not judicially resolve anything" of relevance here (BIO 4) because they "did not involve Choctaw law." BIO 18. According to Respondents, the tribal courts are free to thumb their noses at the federal courts' unanimous holdings, and free to apply Choctaw law to declare the arbitration provision invalid, because the FAA supposedly "does not come into play until after a valid arbitration agreement is found." BIO 15.

Nothing in the Fifth Circuit's decision below endorses Respondents' argument, so Respondents' position hardly provides a reason to deny review. In fact, it only underscores the urgent need for certiorari. Respondents' assertion that the FAA is wholly agnostic on issues of contract validity and that the governing law of validity is determined solely by the forum court's choice of law rules (BIO 13) would have enormous implications for the enforceability of arbitration provisions nationwide. Moreover, it is flatly inconsistent with this Court's teaching that the validity of an arbitration agreement is governed not by state or tribal law but by Section 2 of the FAA, 9 U.S.C. § 2. The FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). When deciding whether an arbitration provision is enforceable, "the court must look to the body of federal arbitration law." *Bhatia v. Johnston*, 818 F.2d 418, 421 (5th Cir. 1987). Congress intended the FAA "to preempt state antiarbitration laws to the contrary," precisely to ensure the broad and uniform validity of arbitration agreements. *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1312 (2001); *see also Tullis v. Kohlmeyer & Co.*, 551 F.2d 632, 638 n.8 (5th Cir. 1977) ("federal rather than state law is controlling as to its validity"); *Harvey v. Joyce*, 199 F.3d 790, 793

(5th Cir. 2000) ("The court is to make this determination by applying the federal substantive law of arbitrability.").[2]

In this case the federal courts have unanimously applied the FAA to hold that the arbitration provision is valid under Ohio law, which governs the Bank One cardmember agreement. *See, e.g.*, *Coates*, 125 F. Supp.2d at 831. Even Respondents acknowledge that "the original contracts' choice of law specification [was] Ohio law" and applicable federal law. BIO 18. The tribal exhaustion doctrine is inapplicable because remitting the parties to tribal court "would serve no purpose other than delay." *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). The Choctaw tribal courts should not be given the opportunity to defy the unanimous holdings of the federal courts that the arbitration provision is binding under the FAA.

The Choctaw tribe may be "a different law-making jurisdiction than the State of Mississippi," BIO 14, but not even the State of Mississippi has the power to hold that the Bank One arbitration provision is unenforceable under the FAA, when the federal courts have decided the contrary. Indeed, the State of Mississippi will not even have the opportunity to adjudicate the question, for under the FAA a federal court may not abstain from a suit to compel arbitration in favor of pending state-court litigation. *See Moses Cone*, 460 U.S. at 19-26; *Bank One, N.A. v. Boyd*, 288 F.3d 181 (5th Cir. 2002).

As a last resort, Respondents contend that the Fifth Circuit decisions in thirty-three (33) cases may be ignored because they are unpublished. BIO 18. Yet Fifth Circuit Rule 47.5.4 specifically provides that unpublished decisions may be cited as persuasive

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[2] To be sure, the FAA incorporates familiar "state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). But under the "federal substantive law of arbitrability," these principles must be applied with "due regard . . . to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. University*, 489 U.S. 468, 475-76 (1989) (internal quotation omitted).

authority. And Respondents completely overlook the fifty-two (52) district court decisions upholding the arbitration provision, as well as the *Chickaway* bankruptcy opinion. Regardless of whether this body of federal precedent is binding as a matter of nonmutual offensive collateral estoppel, it is certainly dispositive of Respondents' claims as a matter of stare decisis. It demonstrates that the tribal exhaustion doctrine is inapplicable here because it would serve no practical purpose.

2. The Fifth Circuit's decision is inconsistent with *Hicks*, *Neztsosie*, and other decisions applying the tribal exhaustion rule.

Respondents' remaining arguments simply ignore the showing in the Petition that the judge-made, prudential doctrine of tribal exhaustion should not be expanded to displace the statutory command of the FAA. Section 4 of the FAA creates a special right to a federal forum for speedy enforcement of arbitration clauses; Section 16 of the FAA establishes a special right of immediate appeal. The Fifth Circuit's expansion of the tribal exhaustion doctrine obliterates these statutory provisions. These are precisely the sorts of "serious anomalies" cited by this Court in *Hicks* as evidence that the tribal exhaustion doctrine does not apply to § 1983 actions. 533 U.S. at 368. Respondents' arbitrary attempt to confine *Hicks* to cases involving state officials (BIO 11-12) is pure ipse dixit.

If anything, Respondents' effort to suggest that *Hicks* relied on implicit values of state sovereignty undermines their own argument. For the Fifth Circuit's decision below improperly elevates tribal courts above state courts. It is undisputed that a federal court faced with a motion to compel arbitration may not abstain in favor of pending state-court litigation, *see Moses Cone*, 460 U.S. at 19-26; *Bank One, N.A. v. Boyd*, 288 F.3d 181 (5th Cir. 2002), yet the Fifth Circuit has held that a federal court in a similar position must defer to an Indian tribal court. Respondents cannot offer any reason that Congress would have wanted state-court actions to proceed promptly to arbitration while allowing Indian

tribal court suits to languish in litigation. The most Respondents can say is that "state sovereignty and tribal sovereignty markedly differ in both their origins and their attributes" (BIO 23) – a true statement, but one which cuts against Respondents. States are fully sovereign entities; Indian tribes are not. Respondents' efforts to analyze the removal statutes (BIO 23-24) are also off-base. This case was not removed from tribal court. This case is a separately filed federal-court suit to compel arbitration pursuant to 28 U.S.C. § 1332.

Notably, this Court's decision in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), relied on an explicit parallel between state and tribal courts to conclude that the tribal exhaustion doctrine did not apply. *See id.* at 485-87. Respondents' argument that the result in *Neztsosie* turned on the "federalization" of state-law claims (BIO 10) and the presence of "a unique removal provision" regarding state-court suits (BIO 11) misses the crucial point: the Price-Anderson Act is utterly *silent* as to removal from tribal court of claims arising under tribal law. *Neztsosie* thus could not have turned on whether tribal claims were "completely preempt[ed]." BIO 20-21. Rather, this Court determined that the tribal exhaustion doctrine was inapplicable by analogy to the congressional treatment of state-court claims. *See* 526 U.S. at 485-87. The same reasoning is squarely applicable here: the fact that a pending state-court suit provides no basis for abstaining from a federal court motion to compel arbitration shows that "Congress prefers (not merely permits) – resolution of those private disputes in a federal forum." BIO 6.

Respondents' claim that "[e]very other federal circuit to address these issues has come out the same way" (BIO 6) is correct, but not in the way Respondents contend. All the cases have resolved the issue in a way that conflicts with the Fifth Circuit decision below:

• *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), held that tribal exhaustion was unnecessary because "Congress has expressed a preference for prompt federal adjudication of citizen suits to enforce the RCRA"

(*id.* at 1098), not because of any complete preemption of state law claims. *Contra* BIO 20. Indeed, the Eighth Circuit expressly noted that Congress "has not prohibited a citizen from raising claims under state law." 867 F.2d at 1098 (internal quotation omitted).

• Respondents acknowledge that the tribal exhaustion doctrine was held inapplicable in *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 83 (2d Cir. 2001); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993); *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 n.2 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992); and *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F. Supp. 753, 754-55 (D.N.D. 1989), which "did not involve any issues of 'tribal law.'" BIO 21. The same is true here, for this case presents a question of federal law under the FAA.

• The other cases cited by Respondents likewise provide no support for the Fifth Circuit's decision. In *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 177 F.3d 1212 (11th Cir. 1999) (earlier decision in same case cited BIO 22), for example, the court of appeals held that a federal district court had jurisdiction to entertain a suit for declaratory relief that all disputes between a bingo facility operator and a tribe were arbitrable. *Id.* at 1222-23. *Tamiami Partners* therefore conflicts with, rather than supports, the Fifth Circuit's holding. In *Ninigret Development Co. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 35 (1st Cir. 2000) (cited BIO 21), the court treated the contractual provision as a forum selection clause – *not* as an arbitration clause – and analyzed the tribal exhaustion issue without regard to the FAA. Unlike Bank One, Ninigret did not even bring a federal suit to compel arbitration.[3]

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[3] *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir. 1997) (cited BIO 21), did not present the question whether the FAA displaced the tribal exhaustion rule. Rather, the plaintiffs argued that exhaustion was not required on the ground that "the Tribal Court is a nullity because it was established in violation of the tribal constitution." *Id.* at 66.

3. This Court should resolve issues of tribal court jurisdiction left open in *Nevada v. Hicks*.

This case presents, in addition to the tribal exhaustion issue, an important question that is the natural successor to *Nevada v. Hicks*, 533 U.S. 353 (2001): whether Indian tribal court jurisdiction extends to civil suits arising out of alleged commercial relationships between members and non-members of the tribe, even where such assertions of jurisdiction are not necessary to protect tribal self-government or to control internal tribal relations. Respondents contend that *Hicks* is distinguishable because it involved a state officer subject to potential liability under § 1983. BIO 29-30. This Court's analysis in *Hicks*, however, is not so limited. Moreover, the ambiguity about the implications of *Hicks* for tribal civil jurisdiction over non-public defendants (in contrast to state officers) is plainly a reason to grant certiorari, not deny it.

Further, there are no issues of "waiver" or other procedural obstacles to this Court's review. Respondents' suggest that Bank One did not challenge tribal jurisdiction below. BIO 25. That is flatly incorrect. Even before this Court's decision in *Hicks*, Bank One expressly stated to the Fifth Circuit that it "preserv[ed] its right to contest tribal jurisdiction at the appropriate time in the appropriate forum." BIO 25. Respondents acknowledge that, after this Court's decision in *Hicks*, Bank One submitted a letter to the Fifth Circuit under Fed. R. App. Proc. 28(j) contesting tribal jurisdiction. BIO 26.

In any event, both the District Court and the Court of Appeals reached and decided the jurisdictional question, so the issue is

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Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412, 1419-22 (8th Cir. 1996) (cited BIO 21-22), did not address whether the FAA displaced the tribal exhaustion rule but rather whether a separate statute (the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq.) did so.

Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1127-30 (9th Cir. 1989) (cited BIO 22), did not analyze the FAA at all, much less consider whether it displaced the tribal exhaustion rule.

properly before this Court. The District Court held that "defendant has advanced the requisite colorable claim of tribal jurisdiction." Pet. App. 21a. The Fifth Circuit held that, "[a]s a threshold inquiry under the tribal exhaustion doctrine, we must determine whether the tribal court's jurisdiction is explicitly limited." Pet. App. 6a n.13. The Court of Appeals held that jurisdiction was proper under an exception to *Montana v. United States*, 450 U.S. 544 (1981): "One of its exceptions . . . applies here: 'A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" Pet. App. 6a-7a n.13 (quoting *Montana*, 450 U.S. at 565).

Hence, the Court of Appeals reached and decided the jurisdictional issue. This case squarely presents the question of whether this so-called "*Montana* exception" should be assimilated into the *Hicks* self-government test. Although Respondents suggest that this question could be revisited after the tribal court conclusively resolves its jurisdiction, BIO 26, there is no reason to await that proceeding. The relevant facts are not in dispute. The matter turns on a pure issue of law. Bank One should not be haled into a tribal forum that lacks jurisdiction over it as a matter of law. That is precisely why this Court granted declaratory relief in *Hicks* without awaiting the tribal court's assessments of its own jurisdiction.

The jurisdictional issue is underscored by the fact that Bank One had no notice that Respondents were members of the Choctaw tribe. Respondents do not live on a central Choctaw reservation, but rather on certain trust parcels spread over several Mississippi counties. Contrary to Respondents' claim (BIO 26), this issue was raised below: they themselves developed it on p. 11 of their Appellees' Brief in the Fifth Circuit. Moreover, the fair notice question is simply a facet of the jurisdictional issue and would therefore be cognizable under the "mere enlargement" doctrine, *see Dewey v. Des Moines*, 173 U.S. 193, 198 (1899); *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972), even if had not been

raised below.[4]

CONCLUSION

This Court should either grant plenary review or GVR this case in light of *Nevada v. Hicks*, 533 U.S. 353 (2001). A GVR would be particularly appropriate because the Fifth Circuit incorrectly described *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), as "the most recent Supreme Court case" relevant to the dispute. Pet. App. 7a. A GVR order is available even though the Fifth Circuit's opinion was released after *Hicks* was decided. This Court has frequently GVR'ed cases even when the appellate opinion postdated the governing Supreme Court decision.[5]

Respectfully submitted.

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[4] Respondents' bizarre claim that credit providers are free to discriminate against members of Native American tribes under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, *see* BIO 26, is surely not a position they would endorse in different circumstances.

[5] *See, e.g.*, No. 97-8284, *Schweninger v. Minnesota*, 142 L.Ed.2d 25 (1998) (remanded in light of *Kansas v. Hendricks*, 521 U.S. 346 (1997)); No. 97-7931, *Coleman v. Minnesota*, 118 S. Ct. 2318 (1998) (same); No. 97-5901, *Hodgkiss* v. *United States*, 118 S. Ct. 597 (1997) (remanded in light of *Bailey v. United States*, 516 U.S. 137 (1995)); No. 90-1936, *Parker Solvents v. Royal Ins. Cos. of Am.*, 502 U.S. 801 (1991) (remanded in light of *Salve Regina College v. Russell*, 499 U.S. 225 (1991), decided a few days before lower court's decision); No. 90-524, *Connecticut v. Geisler*, 498 U.S. 1019 (1991) (remanded in light of *New York v. Harris*, 495 U.S. 14 (1990), decided three weeks before lower court's opinion); No. 89-5991, *Patterson v. South Carolina*, 493 U.S. 1013 (1990) (remanded in light of *Griffith v. Kentucky*, 479 U.S. 314 (1987)); No. 89-401, *Wecht* v. *Inmates of Allegheny County*, 493 U.S. 948 (1989) (remanded in light of *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981)).

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